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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

CITY OF CLEARWATER, FLORIDA, *et al.*,
Petitioners,

v.

CHURCH OF SCIENTOLOGY FLAG SERVICE ORG., INC.,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an antifraud disclosure law which is neutrally and generally applicable both to secular and religious groups, is supported by a compelling state interest in protecting citizens against fraud, requires disclosures identical both to those required in a Houston law upheld by the Fifth Circuit and to those required by hundreds or even thousands of disclosure laws existing across the country for scores of years, and is supported by a host of Supreme Court and Court of Appeals decisions holding that religions cannot violate criminal laws, is nonetheless unconstitutional under the Establishment Clause if applied to a group claiming to be a religion.

2. Whether an antifraud disclosure law which is neutrally and generally applicable both to secular and religious groups, is supported by a compelling state interest in protecting citizens against fraud, requires disclosures identical both to those required in a Houston law upheld by the Fifth Circuit and those required by hundreds or even thousands of disclosure laws existing across the country for scores of years, and is supported by a host of Supreme Court and Court of Appeals decisions holding that religions cannot violate criminal laws, is nonetheless unconstitutional under the Establishment Clause if the need for the law came to attention because of fraud and criminal acts by a group claiming to be religious and that group's actions were mentioned during the consideration and enactment of the law.

3. Whether an antifraud disclosure law which is neutrally and generally applicable both to secular and religious groups, is supported by a compelling state interest in protecting citizens against fraud, requires disclosure identical both to those required in a case upholding a Houston law and to those required by hundreds or even thousands of disclosure laws which have existed around the country for scores of years, and is supported

by a host of Supreme Court and Court of Appeals decisions holding that religions cannot violate criminal laws, is nonetheless unconstitutional under the Establishment Clause if it applies not only to affirmative misrepresentations, but also to fraudulent nondisclosures.

4. Whether the three-pronged test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), is an absolute, per se rule (as held in this case by the Eleventh Circuit) and therefore precludes the use under the Establishment Clause of the compelling state interest test and of the neutrally-and-generally-applicable test laid down in *Employment Division v. Smith*, 494 U.S. 872 (1990).

5. Whether the neutrally-and-generally-applicable test of *Employment Division v. Smith* is barred from use when either a religious or secular group asserts rights of free speech or association.

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PETITION FOR A WRIT OF CERTIORARI

The City of Clearwater, *et al.*, hereby petitions for writ of certiorari to review the judgment of the Eleventh Circuit in this case.[1]

OPINIONS BELOW

The opinion of the district court (App. 72a-139a) is reported at 756 F. Supp. 1498 (M.D. Fla. 1991). The opinion of the Court of Appeals (App. 1a-71a) is reported at 2 F.3d 1514 (11th Cir. 1993). The Court of Appeal's order denying reconsideration is reproduced at App. 140a.

JURISDICTION

The Court of Appeals issued its opinion on September 30, 1993. A petition for rehearing was denied on December 14, 1993. The Circuit rendered judgment on February 28, 1994. This Court has jurisdiction pursuant to 28 U.S.C. 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment, applicable to the states through the 14th Amendment, provides that government shall "make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

INTRODUCTION

In a case brought by an organization claiming to be religious, the Eleventh Circuit has eviscerated a disclosure law enacted by Clearwater to prevent fraud by charitable groups regardless of whether they are secular or religious. App. 144a-164a. The Circuit's decision requires review by this Court because it conflicts with decisions of other courts of appeal, is inconsistent with a century of precedent from this Court, and presents questions of national importance. Thus:

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[1] The parties to this case are Petitioners, the City of Clearwater, Milton A. Galbraith, Jr. and Cynthia E. Goudeau, and Respondent, the Church of Scientology Flag Service Org., Inc.

1. The Eleventh Circuit's decision squarely conflicts with the decision of the Fifth Circuit, per Judge Wisdom, upholding a Houston ordinance in a case brought by a religious group. *International Society for Krishna Consciousness v. City of Houston*, 689 F.2d 541 (5th Cir. 1982). To ensure constitutionality, Clearwater modelled its law on the one upheld in *Houston*: the major disclosure provisions of Clearwater's law are all taken either verbatim or nearly so from Houston's law. Even the Eleventh Circuit conceded that Clearwater's major disclosure provisions are identical to Houston's. *Church of Scientology Flag Service Org. v. City of Clearwater, et al.*, 2 F.3d 1514, 1522 (11th Cir. 1993). Under the Fifth Circuit's decision, those disclosure provisions are lawful. Under the Eleventh Circuit's, the same provisions are *un*lawful.

2. A century of precedent from this Court and courts of appeal holds that religious groups, like secular groups, are subject to laws prohibiting crimes and bad acts, including antifraud disclosure laws. The Eleventh Circuit refused to follow these holdings. Instead, the Circuit struck down an antifraud disclosure law that is neutrally and generally applicable as between religious and secular groups.

3. Clearwater's disclosure law was not only modelled on Houston's, but is similar or identical to hundreds, or thousands, of state, county and city disclosure laws all over the country. These laws have existed for scores of years. They have been thrown into question by the Eleventh Circuit's ruling whenever they are used to prevent crime by any groups, be it secular or religious.

4. The Eleventh Circuit has disabled governments from enacting neutrally and generally applicable laws against crime, if the crimes came to attention because perpetrated by a group claiming to be religious. This governmental disability results from the Circuit's view that animus against crimes is animus against religion if the crimes were committed by persons claiming to be religious, and that a law seeking to stop the crimes must therefore be struck down as being a law against religion.

Under the Circuit's ruling, if a City enacted a law neutrally and generally applicable against sexual abuse of children because the problem had been brought to its attention by recent revelations concerning some Roman Catholic priests, the City's law would be struck down because animus against child abuse would be held to constitute antireligious animus against Catholicism.

5. This Court has often said the three pronged test of *Lemon v. Kurtzman* is not an absolute or per se rule, and has used the compelling state interest test in Establishment Clause litigation. Directly contrary to this Court, the Eleventh Circuit has ruled that the *Lemon* test *is* an absolute, per se rule, and has refused to apply the compelling state interest test in Establishment Clause litigation.

6. In *Employment Division v. Smith*, 474 U.S. 872 (1990), this Court ruled that a law is constitutional under the *Free Exercise* Clause if it neutrally and generally applies to both secular groups and religious ones. The Eleventh Circuit, however, has ruled that the *Smith* test of neutral and general applicability cannot be used to support a law under the *Establishment* Clause or the freedom of speech and association clauses. Further, under the Eleventh Circuit's ruling, if rights of speech and association are asserted, the *Smith* test of neutral and general applicability cannot be used to support a law even if the law applies only to secular groups on a neutral, general basis, and does not apply to religions too.

7. This Court has held that a law which neutrally and generally *benefits* "a broad class of citizens" is lawful under the Establishment Clause when it results in benefits to religion too. The Eleventh Circuit has ruled inconsistently that a law which neutrally and generally *regulates* "a broad class of citizens" is *un*lawful under the Establishment Clause if it regulates religions too.

STATEMENT

A. In the 1970s, Scientology began purchasing property in Clearwater, Florida in order to make it a major

base to which persons would come from all over the world for Scientology training (called "auditing"). Scientology's purchases were made under an assumed name.

Ultimately the purchaser became known, and the citizens and government of Clearwater became concerned. They did not know or care whether Scientology was a religion, and they knew nothing about and had no concern over its claimed religious practices. What they did care about was that for years the Scientologists had been accused and sometimes convicted of criminal acts. The fear was the same as would arise if a small city learned that an organization reputed to be the Mafia was going to take over a major section of town. Religion had nothing to do with the fear. Crime had everything to do with it.

Because of concerns over criminal and other bad acts, in the 1980s Clearwater held legislative hearings to determine the facts. Because Scientology had long been secretive, few persons knew much about it. The only ones who did were (i) the Scientologists themselves, (ii) persons who had previously been Scientologists, had turned against it, and had been harmed by it before or after turning against it and (iii) outside persons harmed by Scientology, who had learned of its actions firsthand.

Given the paucity of knowledgeable individuals, Clearwater employed a special counsel, Michael Flynn, to present evidence and legislative witnesses. Flynn was knowledgeable because he represented persons who had been harmed by Scientology. As special counsel, Flynn served a similar function to those who were special counsel to Congressional committees investigating Watergate and Iran-Contra. The latter counsel conducted investigations, arranged for the presentation of evidence and witnesses, examined witnesses, and were active in recommending possible courses of action. Flynn was familiar with evidence from prior investigations, arranged for the presentation of evidence and witnesses, and recommended possible courses of action.

Scientology itself was repeatedly invited to appear at the legislative hearings to present evidence favorable to itself. It refused to do so unless allowed to exercise a right that does not exist in legislative hearings, the right to cross-examine witnesses. Because it was not allowed to cross-examine, instead of appearing at the legislative hearings, it unsuccessfully tried to enjoin them.

The evidence and testimony of sixteen witnesses at the hearings showed a panoply of crimes and bad acts by and questionable policies of Scientology. The acts and policies are listed in the margin, and prominently included using fraudulent claims and nondisclosures to induce persons to pay huge sums of money to Scientology, and a Scientology policy to:

A. MAKE MONEY

* * *

J. MAKE MONEY

K. MAKE MORE MONEY

L. MAKE OTHER PEOPLE PRODUCE SO AS TO MAKE MONEY [2]

Dealing only with questions of whether Scientology had committed crimes and bad acts, the legislative hearings eschewed inquiry into supposedly religious beliefs, acts or practices of Scientology. City officials, who received ad-

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[2] Other Scientology acts included burglaries to obtain documents for use against critics, electronic bugging of offices to obtain information against critics, framing opponents by manufacturing false evidence, smear campaigns against opponents, infiltrating legal and governmental offices that opposed Scientology, use of harassing phone calls and letters, using confidential information obtained in Scientology "training" to blackmail "apostates" who had left Scientology, beating, kidnapping, and imprisoning persons who wished to leave it, currency smuggling, extortion of money, maintaining virtual slave labor conditions at Scientology bases, attempted murder, failure to feed or provide medical attention to children, and seeking destruction of family relationships. Among the Scientology policies revealed at the legislative hearings were doctrines that an opponent can be physically or economically destroyed by any means whatsoever, that "apostates" who leave the "Church" are subject to all the actions listed above, and that Scientologists should "disconnect" from their families.

vice from constitutional experts on municipal problems such as Professor Charles Haar of Harvard Law School, knew that any action would be unconstitutional if motivated by antagonism to claimed religious beliefs, acts or practices. Particularly because they became convinced that some form of action would have to be taken to protect Clearwater citizens against fraudulent acts, the officials wanted no part of any inquiry or action that would cause an ordinance to be overturned as motivated by animus against the alleged Scientology *religion* or its alleged religious practices.

In eschewing any inquiry into allegedly religious matters, and dealing only with the question of criminal and other bad acts, Clearwater officials followed a pattern that prevailed before, during and after the legislative hearings. From the time its presence in Clearwater became known until today, Scientology has sometimes been spoken of adversely by some Clearwater media, officials or citizens. But the critics have *never* been concerned with or spoken of the purported *religion* or *religious practices* of Scientology. They have been concerned solely with its criminal and other bad acts. The situation has been the same as what occurred before, during and after the passage of RICO. Congress, the press and citizens have spoken of Organized Crime by name and have been concerned with criminal acts, *H.J. Inc. v. Northwestern Bell Telephone Co.*, 422 U.S. 229, 245-247 (1989), but nobody has been concerned that some members of Organized Crime have been Jewish and others Catholic (e.g., Meyer Lansky and Lucky Luciano). The animus has been anti-crime, not anti-Jewish or anti-Catholic. The animus in Clearwater likewise was anti-crime, not anti-Scientology-religion or anti-Scientology-religious-practices.

Nor was it the goal of Clearwater's law that the religion of Scientology or the religious practices of Scientology (if it *is* a religion and *does* have religious practices) should be removed from Clearwater. The goal, rather, was to stop crime by *any* group subject to the

law, including Scientology, regardless of whether the affected group is secular or religious.

B. When the Clearwater hearings were over, the City enacted an antifraud disclosure law to protect its citizens. Although the need for the law had been sparked by Scientology, the City recognized that, to avoid constitutional problems, and to ensure that no other charitable group defrauded Clearwater's citizens, the law had to be neutrally and broadly applicable, not applicable to Scientology alone. The City chose a type of law that had been in widespread use in the United States for decades, a registration and disclosure law. All over the country, such laws require charitable organizations to disclose extensive information about their finances and activities.

Registration and disclosure laws are not widely known to the public or the bar. Yet there are approximately 20 such laws at the state level,[3] and uncountable hundreds or thousands of them at the city and county level—there are several hundred in southern California alone. Operating under Brandeis' principle that sunlight is the best disinfectant, the laws are designed to protect the public against fraud by requiring charitable organizations to register and disclose extensive information about their finances and the uses they make of their monies. The laws generally all require very similar, often identical, information, and the disclosure requirements of Clearwater's ordinance can be met by submitting disclosures filed else-

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[3] E.g. Conn. Gen. Stat. Ann. § 21a-190b, 21a-190c; S.H.A., Ch. 225 Ill. CSA 460/2; Me. Rev. Stat. tit. 9, §§ 5004, 5005; Mass. Ann. Laws, Ch. 68, § 19 (Supp. 1993); N.C. Gen. Stat. § 131C-7 (1993 Supp.); N.D. Cent. Code §§ 50-22-03, 50-22-04; Pa. Stat. Ann. tit. 10, § 162.12-.13 (Purdon); R.I. Gen. Laws § 5-53-2 (Supp. 1993); Va. Code § 57-49; Ark. Code of 1987 § 4-28-406, 407 (Supp. 1991); Ga. Code Ann. § 43-17-3; Haw. Rev. Stat. § 467B-2; Md. Ann. Code tit. 6, § 6-401, 410-12, 507; Mich. Comp. Laws Ann. §§ 400.273, 400.284; Minn. Stat. Ann. §§ 309.52, 309.53; Okla. Stat. Ann. tit. 18, §§ 552.3, 552.5 (West); Ohio Rev. Code Ann. §§ 1716.02, 1716.04 (Page); N.J. Stat. Ann. §§ 45:17A-4, 45:17A-6 (West); N.Y. Exec. Law §§ 172, 172-b (McKinney); W. Va. Code § 29-19-5.

where that contain similar information.[4] For example, the disclosures required by Maryland or California, which Clearwater submitted on summary judgment, could be filed to satisfy Clearwater's law.

The disclosure laws apply to eleemosynary organizations of all types. However, generally enacted long before exposure of fraudulent or questionable activities by religious organizations such as those associated with Jimmy Swaggart, Jim Bakker, or, most recently, at the highest level of Christian Science, the laws usually have not covered religious organizations, except for a Houston law and for laws that extend to religious groups if they engage in activities that are considered commercial or money-making. See, e.g., *Gospel Army v. Los Angeles*, 163 P.2d 704, *appeal dismissed*, 331 U.S. 543 (1947). Aspects of the laws have sometimes been before this Court, see, e.g., *Riley v. National Federation of the Blind*, 487 U.S. 781 (1988); *Secretary of the State of Maryland v. Munson*, 467 U.S. 947 (1984); *Larson v. Valente*, 456 U.S. 228 (1982); and *Village of Schaumberg v. Citizens for a Better Environment, et al.*, 444 U.S. 620 (1980), and the Court, echoing the disinfectant philosophy of Brandeis, has said that disclosure is a permissible, narrow means of preventing fraud.[5] Clearwater's ordi-

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[4] The requirements of three of the disclosure laws were set forth in Clearwater's brief below. App. 165a. The three were the North Carolina law cited with approval by this Court in *Riley v. National Federation of the Blind of N. Caro*, 487 U.S. 781, 795, 799 (1988), the Illinois law, cited by this Court as an acceptable method of preventing fraud in *Village of Schaumburg v. Citizens for a Better Environment et al.*, 444 U.S. 620, 638 n.12 (1980), and the Los Angeles' municipal ordinance upheld in *Gospel Army v. Los Angeles*, 168 P.2d 704 (1945) (per Trayner, J.), appeal dismissed, 331 U.S. 540 (1947). The disclosures required by these laws are *very* similar, often identical, to those required by Clearwater, as was shown in Clearwater's brief below.

[5] In *Larson v. Valente*, this Court stated that the significant interest in protecting against abusive practices in the solicitation of funds is applicable when funds are sought by religious groups. *Larson v. Valente*, 456 U.S. 228, 248-51 (1982).

nance requires disclosures very similar or identical to those of the statutes at issue in this Court's cases.

The antifraud disclosure law enacted by Clearwater thus has widespread, decades-long antecedents which call for the same disclosures. Indeed, the Clearwater law was modeled after, and its disclosure provisions were all taken verbatim or nearly verbatim from, a Houston ordinance upheld by the Fifth Circuit shortly before Clearwater's enactment.

Because Clearwater recognized that its law had to be neutrally and broadly applicable, the ordinance is applicable to all eleemosynary organizations, including religious organizations.[6] The Clearwater law being applicable to all eleemosynary groups, a number of them complied with the law by disclosing the required information before the law was enjoined upon motion of Scientology at the inception of its case. Groups of all sizes which complied with the law before it was enjoined, and longtime legal experts in charitable solicitation, submitted affidavits on summary judgment stating that Clearwater's law can be complied with without undue burden, that such disclosure laws have been complied with all over the country without undue burden, and that such disclosure laws are necessary.

As indicated, Clearwater also submitted registration and disclosure forms from states whose laws require the same information as Clearwater's law and have been complied with for decades by charitable organizations, some-

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[6] In analogous circumstances, Congress, when passing RICO, made the law applicable to more groups than organized crime. As this Court said in January, 1993 in the abortion clinic case, *National Organization for Women, Inc. v. Scheidler*, —— U.S. ——, 114 S.Ct. 798 (1994) (quoting *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. at 248) "[t]he occasion for Congress' action was the perceived need to combat organized crime. But Congress for cogent reasons chose to enact a more general statute, one which, although it had organized crime as a focus, was not limited in application to organized crime."

times including religiously based ones. The City also submitted data showing the highly extensive, complex financial information already compiled for their own purposes by such religious organizations as the American Baptists, the Seventh Day Adventists, and the National Council of Churches of Christ.

So overwhelming was Clearwater's showing on summary judgment that it was not burdensome to comply with its ordinance, that on appeal to the Eleventh Circuit Scientology virtually abandoned the undue burden argument it has stressed for years.

C. After Clearwater's law was enacted, the Scientologists challenged it. They levelled a barrage of charges of unconstitutionality, including claims that the law was motivated by animus against Scientology's allegedly religious beliefs and allegedly religious practices. Scientology sued in the federal district court in Tampa. Clearwater is located in the Tampa metropolitan area, and the Tampa district court had the additional awareness existing when a court is located where events occurred.

Relevant procedural events in the lawsuit are described in a companion petition for certiorari.

During the discovery stages, Scientology deposed a large number of Clearwater officials who had been active in the consideration and enactment of the ordinance. At every deposition, sophisticated, experienced counsel for Scientology questioned the Clearwater officials about the supposed religious animus against Scientology that allegedly underlay the law. The deposition testimony uniformy showed that not one of the officials knew or were concerned about the alleged religious tenets or practices of Scientology, or knew or cared whether Scientology is or is not a religion. The deposition testimony uniformly showed that the officials had been deeply concerned over *crimes and bad acts* committed by Scientology, but had *no* concern over its religious beliefs or practices and, in fact, did not know what they were. The deposition testimony also showed uniformly that the goal of Clear-

water's law was *not* the removal from Clearwater of *any* religion or *any* religious practice, but rather the elimination of fraud by *any* group subject to the law, whether the group was secular or religious.

D. As pointed out in the companion petition for certiorari, Scientology practices litigation *a outrance*. It spends huge sums on attorneys, spending 30 million dollars on lawyers in just 1987 and 1988 alone. Cost is no object, and Scientology drives its opponents to the wall by litigation tactics which the opponents do not have the funds to match.

Therefore, to try to bring the litigation to a head, Clearwater filed a motion for summary judgment and conceded *arguendo*, solely for purposes of summary judgment, that Scientology's beliefs were religious in character. Based on this Court's rulings, the City argued that its own motion for summary judgment was well taken even if one assumes that Scientology is a religion. The City did not concede *arguendo* that Scientology's criminal and bad acts are religious actions, but only that Scientology's beliefs are religious in nature. Nor did the City concede that Scientology is a religion for any purpose *other* than summary judgment motions.

Notably, in a 1986 opinion authored by subsequent Solicitor General Starr and joined by Judge (now Justice) Ginsburg and Judge Silberman, the D.C. Circuit indicated that it too did not necessarily think Scientology is a religion. The court said that, "Whether Scientology is a religious organization, a for-profit enterprise, or something far more extraordinary [is] an intriguing question that this suit does not call upon us to examine. . . ." *Founding Church of Scientology of Washington, D.C., Inc. v. Webster*, 802 F.2d 1448, 1454 (D.C. Cir. 1986).

The district court in Tampa ruled, in accordance with Clearwater's limited *arguendo* concession, that "for purposes of considering the motions for summary judgment, the Court will consider Scientology to be a religion. . . ." *Church of Scientology Flag Service Org. v. City of Clear-*

water, et al., 756 F. Supp. 1498, 1502 (M.D. Fla. 1991). However, the court decided every substantive challenge and issue in favor of Clearwater, rejecting all charges of unconstitutionality.

The district court did not accept Scientology's claim of animus directed against Scientology as a religion or against its allegedly religious beliefs or practices. Rather, in accordance with this Court's holdings that laws of neutral and general applicability can permissibly be applied to religious organizations as well as secular ones, the Tampa district court found that Clearwater's law was applicable to *all* charitable organizations, whether religious or not, and was intended to prevent fraud by *all* eleemosynary groups.

E. Scientology appealed to the Eleventh Circuit, hundreds of miles away in Atlanta. The case was heard by a panel of three judges. The panel proceeded to "reinvent" the facts of the case, and to create important constitutional issues. Its pertinent rulings were:

1. The panel had been informed that deposition testimony showed uniformly that Clearwater was concerned only with crimes and bad acts, and had not known or cared whether Scientology is or is not a religion or what its allegedly religious practices are. Therefore, the panel *extensively* used newspaper articles and television clips, not just statements at hearings, to transmute concern over crime and bad acts into what it called a religious "upsurge in sectarian fervor" against Scientology for the purpose of driving it from Clearwater. 2 F.3d at 1530-31. The transmutation occurred by transforming statements which were adverse to Scientology because of its crimes into statements that supposedly were anti the *religion* of Scientology. It was as if one were to say that media and Congressional statements that were antagonistic to Organized Crime because of its criminal acts showed that RICO was motivated by feelings against the religions of Judaism and Catholicism. Such transmutation of concern over crime into alleged antireligious feelings was held by the panel to "embod[y] a sensitivity to the political reali-

ties of the legislative process that is amply refined to discern such a crude attempt to circumvent federal judicial determination." *Id.* at 1528-29.

In transmuting concern over crime into supposed antireligious animus responsible for alleged "sectarian fervor," the panel even said the newspaper articles were "unrebutted," though the deposition testimony had uniformly denied antireligious animus and had discussed the newspaper articles when doing so. Also, the court even said that "The City may have tried to conduct a second round of hearings to sanitize the legislative record and suggest a neutral motivation," *id.* at 1534, though we are at a loss to know what second round of hearings the court could have meant since there was *no* second round of hearings and none was attempted.[7]

The result of the transmutation was that the court ruled that summary judgment for Clearwater must be reversed because of alleged evidence of religious animus, and that upon remand the few parts of the ordinance left standing will have to be struck down if the City cannot rebut the supposed antireligious animus. However, since the Circuit also said that the unsworn newspaper articles are "unrebutted" evidence of religious animus despite uniformly contrary sworn deposition testimony, as a practical matter it *may not be possible* for Clearwater to "rebut" the newspaper articles, and by its transmutation the court may have condemned Clearwater to future defeat at trial upon remand as well as to existing defeat in the Circuit.

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[7] As part of its transmutation the court also argued that religious animus was shown against Scientology because Clearwater incorporated into its ordinance provisions that eased burdens on some religious or nonreligious groups, such as a provision exempting groups which obtain only very small amounts of contributions. (The exemption is common in disclosure laws because such groups do not create a serious risk of fraud.) The panel ignored that Clearwater also put into the law provisions that it believed would protect and ease the burden on Scientology, such as a provision that not just one but at least ten complaints from persons claiming to be victims must be received before the City Attorney can act.

2. Misstating the limited concession made *arguendo* by Clearwater for purposes of summary judgment motions only, and misstating the district court's limited ruling that it found Scientology to be a religion *for purposes of the summary judgment motions*, the Circuit ruled that Clearwater had conceded that Scientology is a religion *for purposes of the case*. *Id.* at 1520. Therefore, even if Clearwater were able to prove at trial after remand that Scientology is not a religion, that its practices are not religious ones, and that it is instead a massive enterprise to make money, the City could be foreclosed from presenting proof of nonreligiosity because of the Circuit's (inaccurate) holding as to what was conceded. Thus, both by its ruling regarding the supposedly "unrebutted" nature of newspaper articles and by the supposed concession for *the entire case* of religiosity, the Circuit stripped Clearwater of important defenses at trial.

3. On summary judgment Clearwater presented a powerful factual case showing that disclosure laws like its own have been complied with by eleemosynary institutions for decades without undue burden—Clearwater presented a factual case so strong that on appeal Scientology in effect abandoned the undue burden argument it had stressed for years. Nonetheless the Circuit lengthily described the Clearwater ordinance in a way that makes the law appear to require so much information that it cannot readily be complied with, and ruled that a law requiring the disclosure sought by Clearwater is an excessive entanglement with religion because of the disclosures and because mere disclosure of the information allegedly shifts authority from one group to another within a church. This alleged shifting of authority within a church cannot be justified, said the panel, even if a church is defrauding not just its own members *but members of the public*, who need protection from the fraud. *Id.* at 1544.

4. The Circuit ruled that the three pronged test of *Lemon v. Kurtzman*, is the governing rule in Establishment Clause cases, that the compelling state interest/strict

scrutiny test cannot be used to justify governmental regulation under the *Lemon* test, that it is irrelevant under the *Lemon* test that a governmental law meets the test laid down recently by this Court, in *Employment Division v. Smith*, of general and neutral applicability to nonreligions and religions alike, 2 F.3d at 1540-42, and that the *Smith* rule of general and neutral applicability was also inapplicable because Scientology was claiming rights of free speech and free association, not just rights under the Establishment Clause. *Id.* at 1543. The Circuit concomitantly held that the compelling state interest/strict scrutiny test and the *Smith* rule of general and neutral applicability are limited to the Free Exercise Clause. *Id.* at 1540-42. On these bases the Circuit ruled that Clearwater could not support its law by showing it is of general, neutral applicability to religious and non religious organizations alike or by showing that it is justified by a compelling state interest and is narrowly tailored to meet strict scrutiny.

5. Under the Eleventh Circuit's ruling, whenever an organization exercises rights of speech and association, the generally-and-neutrally applicable test of *Employment Division v. Smith* cannot support a law even if the law applies on a broad nondiscriminatory basis only to secular organizations and not to religious ones too.

6. Seeming to recognize that its holding regarding the inapplicability of the compelling state interest test under the Establishment Clause is contrary to this Court's decision in *Larson v. Valente* (as well as to statements made in *Allegheny County v. American Civil Liberties Union*, 492 U.S. 573 (1989)), the Circuit also said *Larson* had used the compelling interest test because that case involved a governmental preference among religious groups, whereas here the "compelling interest justification held out by *Valente* is unavailable to the City . . . because the 1984 Ordinance is facially neutral among religions and indeed applies to wholly secular charities as well as churches," 2 F.3d at 1541-42. Thus, the Circuit's position was that because the City did *not* discriminate

against particular religions, an absolute bar would be imposed against it under the Establishment Clause, instead of judging its law under the more lenient compelling state interest test. Also, the Circuit's position effectively contradicted its claim that Clearwater *did* try to discriminate against the Scientology religion.

7. Saying that the Establishment and Free Exercise Clauses are "closely related in their purposes," that the values of one inform the other, and that conduct often may receive identical judgment under both, *id.* at 1542, the Circuit held that the compelling interest strict scrutiny test is applicable under the Free Exercise Clause though the Circuit held it inapplicable under the Establishment Clause. The Circuit also held that under the decision in *Employment Division v. Smith*, the Free Exercise clause is not violated by application to religion of a neutral, generally applicable law even though the Circuit had held such application barred under the Establishment, Freedom of Speech and Freedom of Association clauses. Despite holding the compelling state interest and generally-and-neutrally-applicable tests to be normally applicable under the Free Exercise Clause, the Circuit nonetheless ruled that these tests are *in*applicable under the Free Exercise Clause in *this* case.

The Circuit said the generally-and-neutrally-applicable-test of *Smith* is inapplicable here under the Free Exercise Clause because, Clearwater's law being applicable only to eleemosynary groups seeking charitable donations, and *not* to commercial groups which do *not* seek charitable donations, the law allegedly is *not* a generally applicable law even though it applies to hundreds or thousands of charitable organizations (as other registration and disclosure laws also do). Rather than being of general applicability, ruled the panel, Clearwater's ordinance impermissibly is directed only at groups exercising first amendment rights (albeit commercial groups also exercise such rights).

The Circuit neither denied nor mentioned that the reason behind registration and disclosure laws is to provide

protection against fraud in solicitations by *charitable* groups, as to whom solicitees are disarmed because they expect "good works" organizations to tell the truth, whereas there is no need for such special protection where profit-making organizations are concerned because persons know to beware of false commercial sales pitches by profit making businesses. The Circuit thus ignored that Clearwater's law and the other registration and disclosure laws are aimed at the only groups causing the problem needing solution, and are generally and neutrally applicable to hundreds or thousands of such organizations.

In ruling the compelling interest/strict scrutiny test inapplicable to registration and disclosure laws under the Free Exercise Clause, the Circuit held (i) that there can be no compelling interest in preventing fraud by a charitable group unless it makes affirmative misrepresentations, as opposed to omitting disclosures necessary to make representations nonfraudulent, 2 F.3d at 1544, and (ii) that there can be no need for a registration and disclosure law if there are other laws which can be applied to an eleemosynary group, such as antifraud laws, extortion laws, burglary laws, etc. *Id.* at 1546-47.

The Circuit did not follow the long established idea that fraud can be perpetrated by material omissions—by nondisclosure of highly pertinent information. It also did not mention that Scientology seeks charitable donations without telling solicitees that its highest officials were convicted of serious crimes, without telling solicitees that Scientology solicitors receive as much as $200,000 to $400,000 per year in commissions, without telling solicitees that it has spent tens of millions of dollars per year on lawyers' fees, without telling them that it spends millions of dollars on advertising campaigns, including $6 million on an advertising campaign in USA Today alone, and without telling solicitees that it has spent seven million dollars on nuclear blast resistant doors for a vault that stores papers of its founder. Clearwater maintains that these are material omissions when seeking allegedly charitable donations.

The Circuit also failed to mention not only that there are uncountable laws (probably tens of thousands of laws) all over the country that have purposes similar to those of other laws, *but that Clearwater cannot enforce the kinds of alternative laws listed by the Circuit* (burglary laws, fraud laws, etc.). For those laws are *state* laws, and Florida law preempts Clearwater from enacting its own version of them. Section 166.021, *Fla. Stat.*; *Board of Trustees of City of Dunedin v. Dulje*, 453 So.2d 177 (Fla. 2d DCA 1984).

* * * *

After the foregoing decision, Clearwater filed a petition for rehearing *en banc*. Though it is rare to do so, after receiving Clearwater's petition the Circuit requested a response from Scientology. The response said nothing new, but the Circuit did not grant rehearing.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Conflicts With The Decision Of The Fifth Circuit In The Houston Case.

Clearwater's law was modelled on the Houston law upheld by the Fifth Circuit when assailed by a religious group in *Houston*. The Eleventh Circuit conceded that the disclosure required by Clearwater "is virtually identical to the disclosure required under the ordinance upheld against facial attack on the free exercise and associational privacy grounds" in *Houston*. 2 F.3d at 1522. The identicalness of the ordinances was deliberate: Clearwater sought to enact a constitutional law, and Houston's ordinance had been upheld by the Fifth Circuit only a year before Clearwater passed its disclosure ordinance. Yet the Clearwater ordinance was struck down, though the identical Houston law was upheld. The conflict in decisions is stark.

The conflict of logic is also stark. The Eleventh Circuit refused to credit Clearwater's crucial interest in protecting its populace against fraud and bad acts and refused to credit the usefulness of disclosure in furthering that interest. The Fifth Circuit took a very different view

of these matters. It stated that " 'Public awareness of abuses in the administration of charitable fund raising practices has increased over the past twenty years.' " It further said that this Court has said that a municipality's interest in "protecting the public from 'fraud [and] crime. . . .' " perpetrated by charitable solicitors is "substantial," the " 'Supreme Court has consistently recognized a municipality's power to protect its citizens from crime . . . by regulating soliciting and canvassing' " and that the high Court has held that " 'Efforts to promote disclosure of the finances of charitable organizations also may assist in preventing fraud by informing the public' " and has "expressly approved the idea of disclosure as a legitimate less intrusive measure than a direct prohibition of solicitation." 689 F.2d at 543, 547, 549, 549 n.6, 550.

Unlike the Eleventh Circuit, which in many respects gave preferential treatment to religions, the Fifth Circuit also recognized that there is no difference between religious and secular groups with respect to the governmental interest in protecting citizens from fraud by means of disclosure laws. Quoting Justice White's opinion for the Court in *Heffron v. Int. Society for Krishna Consciousness*, 452 U.S. 640 (1981), the Fifth Circuit said, " 'Nor for present purposes do religious organizations enjoy rights to communicate, distribute, and solicit on the fairgrounds superior to those of other organizations having social, political or other ideological messages to proselytize.' " *Houston*, 689 F.2d at 551 (quoting *Heffron*, 452 U.S. at 652). The Fifth Circuit then held that

> Considering both opinions in *Heffron* and especially Justice White's opinion for the Court, Krishna followers have no greater rights to constitutional protections than other solicitiors for charitable purposes. We hold, therefore, that the City of Houston may required ISKCON to register, identify its solicitors, and make disclosure reports, concerning its solicitation of public funds without facially violating the first amendment.

689 F.2d at 551.

As said, there is a stark conflict between the decisions and views expressed by the Fifth Circuit in *Houston* and by the Eleventh Circuit below. Certiorari is necessary to resolve this conflict.

II. The Eleventh Circuit's Decision Does Not Conform To Decisions Of This Court Regarding Government's Ability To Prevent Crime By Religious Groups, And Conflicts With Decisions Of Courts Of Appeal On The Subject.

1. For 116 years this Court has followed the principle that laws against crimes or bad acts can be enforced against religious groups as well as other groups. *Reynolds v. United States*, 98 U.S. 145 (1878); *Davis v. Beason*, 133 U.S. 333 (1890); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Employment Division v. Smith*; *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, —— U.S. ——, 113 S. Ct. 2217 (1993). Thus the Court has said: "Crime is not the less odious because sanctioned by what any particular sect may designate as religion." *Davis*, 133 U.S. at 345. "However free the exercise of religion may be, it must be subordinate to the criminal laws of the country. . . ." *Id.* at 342-343. Otherwise "the professed doctrines of religious belief [would be] superior to the law of the land." *Reynolds*, 98 U.S. at 167. Activities, "even when religiously based, are often subject to regulation by the states in the exercise of their undoubted power to promote the health, safety and general welfare." *Wisconsin v. Yoder*, 406 U.S. at 220. "We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate. On the contrary, the record of more than a century of our free exercise jurisprudence contradicts that proposition." *Employment Division v. Smith*, 494 U.S. at 878-879. ". . . [A]dverse impact [upon a religious group] will not always lead to a finding of impermissible targeting [of that group]. For example, a social harm may have been a legitimate concern of government quite apart from discrimination." *Church of Lukumi Babalu Aye*, 113 S. Ct. at 2228.

In addition to ruling that religious groups are subject to criminal and regulatory laws, this Court has held that governments can prevent fraud in the solicitation of funds, whether by secular or religious groups, and that public disclosure laws are a permissible less intrusive alternative to prohibition of solicitation. *Village of Schaumberg*, 444 U.S. at 637; *Munson; Larson; Hynes v. Mayor and Council of Borough of Oradell*, 425 U.S. 610 (1978); *Cantwell v. Connecticut*, 310 U.S. 296, 306 (1940). As the Court said in *Village of Schaumberg*:

> "The Village's legitimate interest in preventing fraud can be better served by measures less intrusive than a direct prohibition on solicitation. Fraudulent misrepresentations can be prohibited and the penal laws used to punish such conduct directly. *Efforts to promote disclosure of the finances of charitable organizations also may assist in preventing fraud by informing the public of the ways in which their contributions will be employed. Such measures may help make contribution decisions more informed, while leaving to individual choice the decision whether to contribute. . . .*"

444 U.S. at 637-638 (emphasis added, citations and footnotes omitted).

Circuit courts of appeal and state supreme courts in many cases have followed the foregoing jurisprudence of this Court. E.g., *Houston* (disclosure laws can be applied to a religious organization); *United States v. Rasheed*, 663 F.2d 843 (9th Cir. 1981), *cert. den.*, 545 U.S. 1157 (1982), and *International Society for Krishna Consciousness v. Barber*, 650 F.2d 430 (2nd Cir. 1981) (fraud by religious groups in connection with the solicitation of funds can be barred); *Gospel Army* (per Traynor, J.) (religious groups can be required to comply with disclosure laws when engaged in commercial activties); *Leary v. United States*, 383 F.2d 851 (5th Cir. 1967), rev'd on other grounds, 395 U.S. 6 (1969), and *State v. Bullard*, 148 S.E.2d 565 (N.C. 1969) (religious use of substances such as marijuana and LSD can be barred); *United States v. Kissinger*, 250 F.2d 240 (3rd Cir. 1958)

(marketing in excess of quotas can be barred); *United States v. Moon*, 718 F.2d 1210 (2d Cir. 1983), *cert. den.*, 466 U.S. 971 (1984) (government can require religious leaders to pay taxes); *People v. Pierson*, 68 N.E. 243 (N.Y. 1903) (parents can be punished for not providing medical care to children); *Harden v. State*, 216 S.D.2d 708 (Tenn. 1948) (use of poisonous snakes in religious services can be barred).

In this case, the decision below overturned a law directed against and neutrally and generally applicable to fraud by secular and religious groups alike, and calling for disclosure as a deterrent to fraud. The Eleventh Circuit's decision thus does not conform to the foregoing rulings of this Court and is in conflict with the foregoing rulings of federal courts of appeal and state supreme courts. Additionally, the Eleventh Circuit has delivered a virtual death blow to a disclosure law.

III. The Eleventh Circuit's Holding Of Excessive Entanglement Knocks Out Hundreds Or Thousands Of Disclosure Laws If They Are Applied To Religious Organizations As Well As Secular Ones, Overrides And Eliminates Any Showing Of Ease Of Compliance With Disclosure Laws, And Directly Conflicts With This Court's 1990 Decision In The *Swaggart* Case.

The Eleventh Circuit has ruled that—*wholly aside from Clearwater's allegedly anti-Scientology-religion motive*—a law calling for the disclosures required by Clearwater's is ipso facto an excessive entanglement that violates the Establishment Clause if applied against a group which is (or at least claims to be) religious. This ruling (i) knocks out all of the hundreds or thousands of disclosure laws like Clearwater's if governments seek to use such laws to protect citizens against fraud by (purportedly) religious groups as well as secular ones, (ii) was delivered despite Clearwater's showing on summary judgment that for decades charitable groups have readily been able to comply with disclosure requirements similar or identical to Clearwater's and were able to readily comply with Clearwater's before its law was enjoined, (iii) was de-

livered though ease of compliance was shown so strongly in the district court that on appeal Scientology virtually abandoned the undue burden argument it had stressed for years,[8] and (iv) disables Clearwater from further showing, at trial after remand, that its law can readily be complied with, that its law in fact *has* been complied with by several groups, and that similar laws elsewhere are readily complied with.

Furthermore, the Eleventh Circuit's ruling was delivered though this Court itself recognized, in the 1990 *Jimmy Swaggart* case which also involved a wealthy religious group, that such groups have sophisticated resources which greatly diminish any burden of compliance with recordkeeping laws, and ruled that even if there *were* burdens, generally applicable recordkeeping violations can be imposed on religious groups without violating the Constitution:

> Appellant alleges that collection and payment of the sales and use tax impose severe accounting burdens on it. The Court of Appeals, however, expressly found that the record did not support appellant's factual assertions, noting that appellant "had a sophisticated accounting staff and had recently computerized its accounting and that [appellant] in its own books and for purposes of obtaining a federal income tax exemption segregated 'retail sales' and 'donations.'" 204 Cal. App. 3d, at 1289, 250 Cal. Rptr., at 905.
>
> Second, even assuming that the tax imposes substantial administrative burdens on appellant, such ad-

[8] As said, charitable organizations of all sizes submitted affidavits stating that Clearwater's law did not create an undue burden. The City also provided registration and financial statements submitted to Clearwater and elsewhere by all kinds of charitable groups, including religious ones. Clearwater submitted financial information from religious groups such as the American Baptists, the Seventh Day Adventists and the National Council of Churches of Christ. Clearwater also cited numerous state statutes and the IRS code which require disclosure of extensive financial information. The City also noted that, despite being required to comply with these laws, charities have thrived in this country.

> ministrative and recordkeeping burdens do not rise to a constitutionally significant level. Collection and payment of the tax will of course require some contact between appellant and the State, but we have held that generally applicable administrative and recordkeeping regulations may be imposed on religious organizations without running afoul of the Establishment Clause. See *Hernandez*, 490 U.S., at ——, 109 S. Ct. at ——.

Jimmy Swaggart Ministries v. Board of Equalization, 493 U.S. 378, 394-95 (1990).

IV. By Equating Governmental Opposition To Crime With Governmental Opposition To Religion, The Eleventh Circuit Has Impaired Government's Ability To Deter And Punish Crime and Has Issued A Decision That Conflicts With The Fifth Circuit's Ruling In The Houston Case.

The Eleventh Circuit has seriously threatened governmental ability to protect citizens against crime, by transmuting animus against crime into animus against religion if the criminal acts of an organization claiming to be religious were the catalyst for a neutrally and generally applicable law. As testified on deposition below by persons familiar with the legislative process, it is common for a widely applicable prophylactic law to be sparked by the criminal or other actions of a single group, as RICO was sparked by the crimes of the group known as Organized Crime. When this occurs, the media, citizens, legislators and executive officials commonly and often wrathfully refer to that group before, during and after the legislative process, as Organized Crime has wrathfully been referred to in connection with RICO. They do not speak in some form of highly abstract terms, but of the conduct of a particular group which made the law necessary. The law, however, generally applies more broadly than to that group alone; it may neutrally and generally apply to a host of groups, secular and religious, as Clearwater's does. If the law against crime is nonetheless unconstitutional because enacted due to the conduct of a particular group spoken of by name in connection with the legislation, laws against crime will be wiped out all over the country.

This is bad enough even if confined to situations where the criminal acts have been committed by religious groups, but it is unlikely to be confinable to such situations. For nonreligious groups will powerfully begin claiming discrimination against *their* rights of free speech and free speech and free association—just as Scientology itself has made such claims.

All of this describes the situation in this case. The crimes of Scientology sparked the Clearwater ordinance. *Because of the crimes*, Scientology was spoken of, sometimes wrathfully, before, during and after the legislative process. But the law sparked by Scientology applies neutrally and generally to a host of organizations, including innumerable secular ones, and several of the secular ones even registered and filed disclosure materials conforming to the law before Scientology obtained an injunction which has not been lifted for more than a decade. Yet the Eleventh Circuit has eviscerated Clearwater's law by equating opposition to crime with opposition to religion.

The Eleventh Circuit's transmutation of opposition to crime into opposition to religion also conflicts with the Fifth Circuit's decision in *Houston*. In that case, the City "completely revised" its ordinance *after* the Society for Krishna Consciousness had already brought suit, i.e., when the city was already deeply embroiled against the religious plaintiff. *Houston*, 689 F.2d at 543. Yet, despite the embroilment, nowhere did the Fifth Circuit even hint that the "completely revised," neutrally-and-generally applicable ordinance should be considered the product of religious animus. Instead, in direct conflict with the Eleventh Circuit, the Fifth correctly considered the law, on which Clearwater's is modelled, to be the product of a desire to protect citizens against fraud.

The desire to protect against fraud is, of course, permissible even if there is an impact on religious groups. Thus, just last term this Court, citing cases on which Clearwater relies, said in a case involving a religious group: "To be sure, adverse impact will not always lead to a finding of impermissible targeting. For example, a

social harm may have been a legitimate concern of government for reasons quite apart from discriimnation. *McGowan v. Maryland*, 366 U.S. at 442. See, e.g., *Reynolds v. United States*, 98 U.S. 145 (1879); *Davis v. Beason*, 133 U.S. 333 (1980)." *Church of Lukumi Babalu Aye*, 113 S.Ct. at 2229.

V. The Decision Of The Eleventh Circuit Conflicts With Rulings Of This Court And Courts Of Appeal Allowing Government To Prevent Fraud Perpetrated By Material Omissions And Allowing More Than One Law To Be Used To Combat Crime.

Long established precedents of this Court and courts of appeal establish that government can prevent fraud whether committed by affirmative misstatements *or* by omissions of material information. *U.S. v. Rasheed.* In conflict with these authorities, the Eleventh Circuit has ruled that government cannot protect against fraud by religious groups if they perpetrate it "merely" by material omissions. The Circuit offered no supporting precedent for opening the door to fraud in this way, and, aside from the absence of precedent, Clearwater is at a loss to understand either why the Constitution requires fraud by material omission to be countenanced when perpetrated by religious organizations though not when perpetrated by secular ones, or why such disparate favorable treatment for religious groups is not a preference for religion in violation of principles settled in *Everson v. Board of Education*, 330 U.S. 1 (1947). Is it too sarcastic to say that next we will hear that theft without use of weapons is permissible when perpetrated by religious groups though not when perpetrated by others?

Second, arguing that Clearwater's law is unnecessary because other laws could be used, the Eleventh Circuit ignored that it is typical for more than one law to cover a problem, that this Court has stated that disclosure laws can be used in addition to penal laws to combat fraud, and that Clearwater cannot protect its citizens under the other laws mentioned by the Circuit because they are state laws and the City cannot enforce them or enact

analogs of them. Moreover, the ruling that a law cannot be used against a religious organization if other laws allegedly are available casts doubt on the usability of numerous types of laws, specifically including the hundreds of thousands of state, city and county registration and disclosure laws.

VI. The Eleventh Circuit's Decision Is Inconsistent With This Court's Rulings On The Use Under The Religion Clauses Of The Compelling State Interest Test And The Generally-And-Neutrally-Applicable Test. If The Decision Below Were Held Consistent With This Court's Rulings On Those Tests, The Circuit's Decision Would Cast Doubt On The Continued Desirability Of The Three Pronged Test Of *Lemon v. Kurtzman*.

The three pronged test of *Lemon v. Kurtzman* has been criticized by Justices, has been declared by the Court to comprise only signposts rather than absolutes, has been the object of Court statements that there can be "no fixed, *per se* rule" in Establishment Clause cases and "we have repeatedly emphasized our unwillingness to be confined to any single test or criteria" in this area, and sometimes has not even been used by the Court in Establishment Clause cases. *Lynch v. Donnelly*, 465 U.S. 668, 679 (1984); *Lamb's Chapel v. Center Manchester Union Free School Dist.*, —— U.S. ——, 113 S. Ct. 2141, 2150 (1993) (Justice Scalia, concurring); *Hunt v. McNair*, 413 U.S. 734, 741 (1973) (regarding signposts). Still, calling *Lemon* "the basic standard of judicial review" applicable here under the Establishment Clause, the Eleventh Circuit, contrary to this Court's jurisprudence, held that "the criteria adopted in *Lemon* and elaborated in its progeny *are absolute in themselves* [rather than signposts], and a law that fails to meet any of them *is per se invalid*." 2 F.3d at 1527, 1539 (emphasis added). Holding the *Lemon* criteria absolute, the Circuit (1) refused to apply under the Establishment Clause the compelling state interest test and (2) refused to apply under the Establishment Clause the generally-and-neutrally-applicable test of *Smith*. In addition, the

Eleventh Circuit also refused to apply *Smith's* neutrally-and-generally-applicable test because rights of free speech and free association were purportedly at issue.

In refusing to apply the compelling state interest or generally-and-neutrally-applicable tests under the Establishment Clause, the Circuit cast doubt on laws (such as Clearwater's) that prevent crime by religious organizations. This raises a question of great importance to the country, the more so because laws against crime have previously been upheld against Free Exercise and Establishment Clause attacks in a host of cases cited above. Moreover, if it is correct that the compelling state interest test cannot be used to uphold criminal laws under the *Lemon* criteria, this casts grave doubt on the continued viability of that case.

Furthermore, the Circuit's holding also contradicts this Court's statements that there is no "fixed, per se rule" and that *Lemon's* three criteria are only signposts rather than absolutes, and is directly inconsistent with this Court's decision in *Larson v. Valente*, where the Court applied the compelling state interest test under the *Lemon* criteria. In *Larson* the Court said the *Lemon* "tests do reflect the same concerns that warranted the application of strict scrutiny." 456 U.S. at 252. It then held that, under the entanglement and primary effect prongs of *Lemon*, the statutory provision at issue "is not closely fitted to the furtherance of any compelling governmental interest, . . . and that the provision therefore violates the Establishment Clause." *Id.* at 255. This clearly shows the applicability of the compelling interest/strict scrutiny test under the *Lemon* criteria.

In holding *Smith's* generally-and-neutrally-applicable test to be inapplicable under the Establishment Clause, the Circuit again cast doubt on the continued viability of a host of laws combatting criminal acts by religious groups, contradicted this Court's rulings that the *Lemon* criteria are not fixed, per se rules or absolutes but only signposts, created an important question as to why a test thought essential to permit needed law enforcement under

the Free Exercise Clause should not be followed when the same law enforcement is at stake under the Establishment Clause, and cast doubt on the continued desirability of *Lemon* if the Circuit's view of that case is correct.

Furthermore, less than one year ago this Court held that provision of government benefits to religious groups does not violate the Establishment Clause if the benefits are generally and neutrally made available "to a broad class of citizens." *Zobrest v. Catalina Foothills School District*, —— U.S. ——, 113 S. Ct. 2452, 2466 (1993). It is inconsistent to rule, as the Circuit did, that although benefit laws can be applied to religious groups if generally and neutrally applicable to many groups, criminal and regulatory laws cannot also be applied to religious groups if generally and neutrally applicable to many groups.[9]

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[9] On November 16, 1993, Congress enacted a statute purporting to eliminate the generally-and-neutrally-applicable test in Free Exercise cases, in favor of the compelling state interest test. 107 Stat. 1488. Whether this law is constitutional in general, or whether, more specifically, it is constitutional for Congress to eliminate the general-and-neutrally-applicable test with regard to state and local laws combatting crime (as opposed to Congress' own laws), are matters that can and doubtlessly will be debated. Also, the law enacted in November does not apply to the Establishment Clause, so a further question, if the law is otherwise constitutional, will be whether courts should themselves apply the same rule under the Establishment Clause. Clearwater's arguments in this petition regarding the generally-and-neutrally-applicable test would become moot only if Congress could constitutionally enact the November law, if Congress could constitutionally require it to govern efforts of state and local governments to combat crime, *and* if courts were themselves to apply the principle of the law to Establishment Clause cases.

VII. By Refusing To Apply Smith's Neutrally-And Generally-Applicable Test On The Ground That Fundamental Liberties Of Speech And Association Are Involved, The Eleventh Circuit Has Outlawed Every Disclosure Law In The Country Similar Or Identical To Clearwater's, Has Created A Question Of National Importance, And Has Issued A Ruling Inconsistent With *Smith*.

The Eleventh Circuit also refused to apply *Smith's* neutrally-and-generally-applicable test because rights of free speech and free association are asserted here. Rejecting Clearwater's argument that its law should be upheld under *Smith* because the ordinance is neutrally and generally applicable both to secular and religious groups, the Circuit said that both "Solicitation by secular charities . . . [and] solicitation by religious organizations . . . are protected as aspects of First Amendment speech and associational freedoms. The ordinance thus has no application to conduct whose exercise is not regarded as a fundamental constitutional liberty and the rule of *Smith* therefore does not apply." 2 F.3d at 1543.

This ruling, applicable in express terms whenever secular *or* religious organizations are involved, *outlaws every single one* of the hundreds or thousands of laws requiring charitable organizations to make disclosures similar or identical to those required by Clearwater, and outlaws these statutes even if they require disclosure from secular organizations only. It thus has an impact of national importance across the country. It also is contrary to this Court's decision in *Smith* because, contrary to the Eleventh Circuit's contrary implication, *Smith* too involved "a fundamental constitutional liberty," the right of free exercise of religion.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 91-3988

CHURCH OF SCIENTOLOGY FLAG SERVICE ORG., INC.,
Plaintiff-Appellant,

v.

CITY OF CLEARWATER, MILTON A. GALBRAITH, JR., City Attorney of the City of Clearwater, CYNTHIA E. GOUDEAU, City Clerk of the City of Clearwater,
Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Florida

Sept. 30, 1993

Before ANDERSON and DUBINA, Circuit Judges, and CLARK, Senior Circuit Judge.

DUBINA, Circuit Judge:

This appeal involves a challenge to an ordinance regulating the solicitation of funds by charitable organizations in the City of Clearwater, Florida ("Clearwater"). Plaintiff Church of Scientology Flag Service Organization, Inc. ("Scientology") claims that the ordinance deprives it of rights and liberties guaranteed by the First and Fourteenth Amendments of the Constitution of the United States in violation of 42 U.S.C. § 1983. Scientology appeals the district court's order granting summary judg-

ment to the defendants (collectively "the City")[1] and denying summary judgment to Scientology. *Church of Scientology Flag Servs. Org. v. City of Clearwater*, 756 F.Supp. 1498 (M.D.Fla.1991). We affirm in part, vacate in part, reverse in part and remand.

I. BACKGROUND

Scientology, a worldwide organization, maintains one of the largest centers of its activities in Clearwater. The history, organization, doctrine and practices of Scientology have been thoroughly recounted in numerous judicial decisions. *See, e.g., Hernandez v. Commissioner*, 490 U.S. 680, 684-86, 109 S.Ct. 2136, 2141, 104 L.Ed.2d 766 (1989); *Church of Scientology v. Commissioner*, 823 F.2d 1310, 1313-14 (9th Cir.1987), *cert denied*, 486 U.S. 1015, 108 S.Ct. 1752, 100 L.Ed.2d 214 (1988); *Founding Church of Scientology v. United States*, 409 F.2d 1146, 1151-52 (D.C.Cir), *cert. denied*, 396 U.S. 963, 90 S.Ct. 434, 24 L.Ed.2d 427 (1969), *and on remand, United States v. Article or Device Hubbard Electrometer*, 333 F.Supp. 357 (D.D.C.1971); *Christofferson v. Church of Scientology*, 57 Or.App. 203, 644 P.2d 577, 580-81, *pet'n denied*, 293 Or. 456, 650 P.2d 928 (1982), *and cert. denied*, 459 U.S. 1206, 103 S.Ct. 1196, 75 L.Ed.2d 439 (1983).

We need not reiterate this background because the district court found that no genuine factual issues existed to dispute Scientology's claim of being a bona fide religion. *See* 756 F.Supp. at 1502-04. The district court granted partial summary judgment to Scientology on that issue. *Id.* at 1532; *accord Founding Church of Scientology*, 409 F.2d at 1160; *Christofferson*, 644 P.2d at 600-01. As the City has neither appealed from that order nor argued that Scientology is not entitled to pro-

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[1] Defendants are the City of Clearwater, its city attorney Milton A. Galbraith, Jr., as successor to Thomas Bustin, and city clerk Cynthia Goudeau, as successor to Lucille Williams.

tection under the religion clauses of the First Amendment, we must assume that the district court was correct. In addition, without deciding the question ourselves, we note that research has not uncovered any holdings that Scientology is not a religion for First Amendment purposes. *But of Church of Scientology v. Commissioner*, 823 F.2d at 1316-18 (upholding Tax Court determination that Church of Scientology was not entitled to religious tax exemption under 26 U.S.C. § 501(c)(3) for certain years because its revenues inured to the benefit of individuals and non-religious entities).

II. PROCEDURAL HISTORY

In 1983 the City enacted Ordinance No. 3091-83 (the "1983 Ordinance"). The 1983 Ordinance imposed substantial recordkeeping and disclosure requirements for all charities and religious organizations soliciting funds in Clearwater. Scientology filed an action in the district court seeking an injunction against its enforcement. That action was consolidated with a similar case brought by Americans United for Separation of Church and State, Inc. ("Americans United"). Before the district court could rule on the law's validity, however, the City enacted Ordinance No. 3479-84 (the "1984 Ordinance"), repealing and modifying the 1983 Ordinance in part. Clearwater, Fla., Code Ordinances, tit. VIII, § 100 (1984) (hereinafter "Code § ——"). Both plaintiffs filed new lawsuits to challenge the revised ordinance and its 1983 predecessor.

In the second Scientology suit, the district court ruled the 1993 Ordinance unconstitutional on its face and permanently enjoined the City from enforcing it. The court further ruled the 1984 version facially valid, without reaching the question of its validity as applied to Scientology and Americans United. The City appealed the former ruling and Scientology and Americans United were permitted to file interlocutory cross-appeals of the latter. We vacated the former as moot, reasoning that challenges to the repealed 1983 Ordinance

posed no live controversy suitable for judicial resolution. *Church of Scientology Flag Serv. Org. v. City of Clearwater*, 777 F.2d 598, 604-06 (11th Cir.1985), *cert. denied*, 476 U.S. 1116, 106 S.Ct. 1973, 90 L.Ed.2d 656 (1986) (hereinafter *Scientology-Clearwater I*), *overruled, Northeastern Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, —— U.S. ——, ——, 113 S.Ct. 2297, 2301, 124 L.Ed.2d 586 (1993). We dismissed the interlocutory cross-appeals as improvidently granted, finding nothing in the record to support (or controvert) a conclusion that the plaintiffs possessed a sufficient interest in the outcome of the litigation to confer standing. *Scientology-Clearwater I*, 777 F.2d at 607. *But see Pennell v. City of San Jose*, 485 U.S. 1, 7-8, 108 S.Ct. 849, 855, 99 L.Ed.2d 1 (1988) (holding that allegations of complaint should be accepted as true and construed in favor of standing when there is no factual record). We also affirmed the district court's denial of preliminary injunctive relief. 777 F.2d at 608.

Scientology continued to prosecute its second action challenging the 1984 Ordinance. Scientology also petitioned for leave to amend the complaint in its first pending action to challenge the new 1984 law. The district court apparently did not rule on that petition but rather proceeded to address the merits in the second Scientology case. Upon granting summary judgment to the City in that second case, from which this appeal followed, the district court dismissed with prejudice the earlier action for want of prosecution. The court also denied Scientology's request for attorney fees in the first action. In *Church of Scientology Flag Service Organization v. City of Clearwater*, —— F.2d ——, (11th Cir.1993) (hereinafter *Scientology-Clearwater II*), this panel reversed the district court's denial of attorney fees in the first filed action.[2]

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[2] We reasoned that the filing of the lawsuit had caused the City to amend the 1983 Ordinance in a manner that significantly af-

Having found that Scientology had standing to sue in the second action, the district court further found the 1984 Ordinance constitutional, both on its face and as applied to Scientology, and therefore granted the City's motion for summary judgment and denied Scientology's cross-motion for summary judgment. Scientology then perfected this appeal.

III. THE ORDINANCES

The 1984 Ordinance, like its 1983 predecessor, is designed to regulate the solicitation of contributions within Clearwater by "charitable organizations," a term that includes religious groups. Code § 100.01(1). The regulated "solicitation of funds" is defined to mean:

> any request, within the City of Clearwater, for the donation of money, property, or anything of value . . .; or the selling or offering for sale of any property, real or personal . . . , whether of value or not, including but not limited to, goods, books, pamphlets, tickets, publications or subscriptions to publications, upon the representation, *expressed or implied*, that the proceeds of such sale will be used for a charitable purpose.

Code § 100.01(2) (emphasis added). "Expressly excluded from the meaning of 'solicit funds' . . . is any offer of membership in any charitable oganization." *Id.* As Scientology points out, virtually any sale of religious literature carries the implied representation that the proceeds will be used to further the seller's purposes or, at least, to "benefit" the organization. (Appellant's Br. at 34-35). In essence, therefore, all speech that is not delivered *gratis* will subject a charitable organization to regulation. An organization is exempt, however, if it is

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fected the legal relationship between the parties. Therefore, Scientology was a "prevailing party" under 42 U.S.C. § 1988 and presumptively entitled to an award of attorney fees.

all-volunteer and/or small in scale. Code § 100.02(1). A similar exemption applies to all-volunteer scholarship organizations. Code § 100.02(2).

The 1984 Ordinance is a licensing statute that requires charitable organizations to disclose certain information about themselves, their officers and the methods and purposes of the solicitation. A non-exempt organization that solicits without obtaining an annual registration certificate from the city clerk commits a criminal offense. Code § 100.05(1)(i). To obtain that certificate, an organization must file a registration form with the clerk. The form is a public document, Code § 100.03(7), submited under oath, which must disclose among other things:

> (a) The name of the person registering and desiring to solicit funds for charitable purposes.
>
> (b) Whether the person registering is a natural person, partnership, corporation, or association and, . . .
>
> (c) A reference to all determinations of tax-exempt status under the Internal Revenue Code of the United States and law of any state, and the laws of any county or municipality.
>
> (d) A brief description of the charitable purpose for which the funds are to be solicited, and a brief explanation of the intended use of the funds toward that purpose.
>
> (e) The names, mailing address[es] and telephone number[s] of all individuals authorized to disburse the proceeds of the solicitation.
>
> (f) The names, mailing address[es] and telephone number[s] of all individuals who will be in direct charge or control of the solicitation of funds.
>
> (g) The time period within which the solicitation of funds is to be made. . . .

(h) A brief description of the methods and means by which the solicitation of funds is to be accomplished.

(i) An estimated schedule of salaries, wages, fees, commissions, expenses and costs to be expended and paid in connection with the solicitation of funds *and* in connection with their disbursement, and an estimated percentage of the total projected collections which the costs of the solicitation will comprise.

(j) The names of any other cities in Florida in which the person registering has collected funds for charitable purposes within the past five (5) years. . . .

. . . .

(m) The names of any officer . . . or any current agent or employee engaging in the solicitation of funds who has been convicted of a felony or a misdemeanor involving moral turpitude within the past seven (7) years, the nature of the offense, the State in which the conviction occurred, and the year of such conviction.

(n) A brief explanation of the reasons, if the person registering is unable to provide any of the foregoing information, why such information is not available.

Code § 100.03(1) (emphasis added). This information is virtually identical to the disclosure required under the ordinance upheld against facial attack on free exercise and associational privacy grounds in *International Society for Krishman Consciousness v. City of Houston*, 689 F.2d 541, 559-61 (5th Cir. Unit A 1982) (hereinafter *ISKCON-Houston*), although, as discussed below, there are significant differences between the Clearwater and Houston laws.[a]

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[a] Fifth Circuit decisions rendered by Unit A of that court after September 30, 1981, are not binding upon this court, but they are persuasive authority. *Stein v. Reynolds Sec., Inc.*, 667 F.2d 33, 34 (11th Cir.1982).

Unlike the Houston submission, the Clearwater form must be filed even if the organization intends to solicit only from its own members, although the form may omit certain information "regarding the solicitation of funds from members," provided it so states. Code § 100.02(3). Thus, as we read the Clearwater ordinance, an organization soliciting only from its members may omit the information required by subsection (d) through (i) of Code § 100.03(1). Nevertheless, even when no public solicitation is planned, subsections 100.03 (1)(a), (b), (c), (j) and (n) of the code require an organization publicly to disclose significant information, namely the nature and identity of the organization, its tax-exempt status, the detailed criminal histories of its officers and solicitors, the names of other Florida cities in which it has registered and an explanation why any of the foregoing information is unavailable.

The City's law also requires organizations omitting information from the registration form to prepare a sworn "private statement at least annually that contains all of the information" that otherwise would be required in the registration form. Code § 100.02(3)(b). The organization must maintain the records used to complete the private statement for at least three years "and, together with the private statement, make[] them reasonably available for inspection by every member of the charitable organization." Code § 100.02(3)(c). Wilful failure to prepare a truthful private statement, maintain the records or make the statement and records available to members is a criminal offense. Code § 100.05(1)(k). The same supporting documentation must be maintained when the organization files a public registration form, Code § 100.04, and failure to do so is also an offense, Code § 100.05(1)(j).

At the end of each annual registration period the organization must file a retrospective reporting statement giving "the full amount of money and property collected" in Clearwater and "a complete list of any and all expenses incurred in procuring those funds . . . broken

down into salaries, wages, fees, commissions, advertising and all other expenses." Code § 100.03(8). The organization must reveal "the bank, if any, where the proceeds of those solicitations of funds were placed" and the "actual or proposed utilization in approximate amounts of the said proceeds," *id.*, and maintain supporting documentation for three years, Code § 100.04. Information about solicitations from members may be omitted on the same terms as the omission of similar information from the registration form, namely, upon condition that the organization prepare a "private statement" subject to disclosure along with supporting documentation upon request by a member, failure to prepare or disclose the materials being a criminal offense. Code § 100.02(3). Wilful failure to file truthful registration forms and retrospective annual statements is also an offense. Code § 100.05(1)(b). These provisions for retrospective disclosure differ from the Houston ordinance by (1) requiring detailed disclosure of the expenses incurred in the solicitation, (2) requiring disclosure of the bank account in which funds are located, (3) requiring disclosure of every proposed or actual use of the funds, (4) requiring the maintenance of supporting documentation for three years, (5) applying themselves to membership solicitations, and (6) imposing criminal penalties.

The Clearwater ordinance defines a number of other criminal offenses, including:

> (a) wilful[ly] us[ing] any solicited funds or soliciting or retaining funds to support or execute any conduct that is criminal or illegal under the laws of the [city, county, state, or federal government];
>
> * * * *
>
> (c) us[ing] any scheme or artifice to defraud or obtain money or property by means of any false statement or representation;
>
> (d) wilfully concealing the identity of an organization on whose behalf solicitations are being made;

> (e) knowingly misrepresenting that the proceeds of any solicitation of funds, under current law, would entitle the donor to a Federal or State income tax deduction;
>
> (f) promising any person that the proceeds of a solicitation of funds will be refunded upon request, and thereafter wilfully failing within 60 days to make a refund that has been requested in writing;
>
> (g) promising any person that refunds of the proceeds of the solicitation of funds will be made upon request without providing such person, at the time such representation is made, with a written statement of the terms and conditions upon which refunds are made; provided, however, that any statement made in good faith at the time is not prohibited by this section; . . . .

Code § 100.05(1). All offenses under the law are punishable by a fine of up to $1,000 and/or imprisonment for up to six months. Code § 100.05(2). No such criminal provisions were included in the Houston ordinance.

The city clerk has power to review the registration form to determine whether it meets the ordinance's requirements and may deny registration if she determines that it does not. The clerk testified that she and her staff would exercise their personal judgment, under the direction of the city attorney, to decide whether a given response was adequate. For example, she and the city attorney would determine whether the stated purpose of the solicitation was in fact a charitable one. [R5-110-Tab 2-Exh. A-46-49.] In addition, although the statute provides no guidance on the subject, the city attorney testified that a general statement along the lines of "We are a benevolent society and we will use [the funds] as our governing board decides is within our purposes" would not provide adequate information to satisfy the requirements of Code § 100.03(1)(d). He was unable to say, however, whether a statement like "We are a

church and we will use [the funds] for general church purposes" would be sufficiently specific. [R5-110-Tab 2-Exh. B-49.]

Whatever level of detail would meet the city officials' standards concerning disclosure of charitable purpose, we may presume that they require a more specific explanation of how the funds will be used to further the purposes stated. In these respects the Clearwater ordinance confers broader executive discretion than the Houston law, which the Fifth Circuit interpreted as conferring only the ministerial authority to determine "two objective facts: (1) whether information is provided, and (2) whether an explanation for failure to supply the information is provided," *ISKCON-Houston,* 689 F.2d at 547. The City of Houston had adopted an interpretation of the law giving the administering official no discretion to evaluate the adequacy of information provided by registrants. For example, any question about the required detail of disclosure concerning the purposes of solicitation would have been resolved in the registrant's favor. *Id.* at 555.

If the city clerk denies registration, the organization may still continue to solicit in Clearwater. The clerk must initiate a declaratory judgment action in state circuit court to "review" her decision. Code § 100.03(3). Presumably the court may set aside the denial if it finds the clerk acted improperly, but neither the ordinance nor the Florida declaratory judgment act provides express criteria by which the decision should be judged. The ordinance also permits the court to dispense with the requirement of furnishing information whose disclosure it finds to constitute a "special or unique hardship to the charitable organization." Code § 100.03(4). Again, no further express guidance is offered.

Upon receiving ten "bona fide complaints," sworn in writing and suggesting that an offense has occurred, the

city attorney may investigate.[4] The attorney may subpoena witnesses and documents, including "private statements" and the documentation supporting them. Upon investigation, and having found probable cause to believe that an offense has occurred, the attorney "shall" institute a prosecution. Code § 100.06. We note that these provisions entitle the city attorney to obtain the so-called "private" statements (and all of the supporting records), and presumably treat them as public documents, in the course of an investigation or prosecution to determine whether an organization was entitled to omit the specified information from its public registration form.

The ordinance has an express severability clause. 1984 Ordinance § 10.

IV. ISSUES

We confront several complex issues in this appeal. First, Scientology argues that there are sufficient facts in dispute to preclude summary judgment on its claim that the 1984 Ordinance (like its 1983 predecessor) was enacted for the impermissible purpose of discriminating against it in favor of more popular religious organizations. Second, Scientology contends that, as a matter of law, the disclosure requirements applicable to solicitations of members and the public constitute an impermissible government "entanglement" in matters of ecclesiastical authority and governance in violation of the Establishment Clause. Although Scientology contends that such excessive entanglements may not be justified by resort to the balancing

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[4] Although the relevant provision of the 1984 Ordinance substituted the phrase "shall investigate . . . only after receiving ten bona fide complaints" for the apparently equivalent language in the 1983 Ordinance providing that the city attorney "may investigate . . . upon receiving ten bona fide complaints," the City adopted the position in *Scientology-Clearwater II* that this change removes all discretion from the city attorney. Nevertheless, it appears that the prosecutor retains unreviewable discretion to determine whether a complaint is "bona fide."

of compelling governmental interests that is applicable in other areas of constitutional law, it further contends that this disclosure of information concerning member solicitation is not narrowly tailored to serve such an interest. Third, Scientology argues that the ordinance is vague and confers overly broad discretion upon the city clerk to deny a registration certificate, thereby imposing an impermissible prior restraint upon its exercise of religion. Finally, Scientology argues that the requirements of providing a refund policy in writing and making refunds within sixty days also represent impermissible invasions of church governance and religious practice.[5]

After considering the question of standing, we address these issues in turn.

V. STANDING

Scientology is a charitable organization as defined under the 1984 Ordinance and is subject to direct regulation thereunder. As already detailed, the regulation is substantial and, accordingly, represents a sufficiently direct injury to Scientology to confer standing. The injury is caused by the City's ordinance (in other words, the injury is fairly traceable to the challenged conduct) and would be redressed by invalidation of the regulatory scheme: Therefore, Scientology meets the "case" or "controversy" requirements for standing imposed by Article III of the Constitution. *See California Bankers Ass'n v.*

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[5] While Scientology argues on appeal that the entire 1984 Ordinance is unconstitutional, its brief challenges certain provisions only. *See generally* Code §§ 100.01(2), 100.01(3), 100.02(3)(c), 100.03(1), 100.03(1)(a), (b), (c), (d), (j) and (n), 100.03(2), 100.03(3), 100.03(4), 100.03(7), 100.03(8), 100.04, 100.05(1)(b), (f) and (g), 100.05(2), 100.06, 100.06(1), and 100.06(2). It is these provisions that we confront. All other provisions of the 1984 Ordinance not specifically addressed or encompassed by this opinion remain valid should the district court on remand determine that (1) the 1984 Ordinance was enacted without a discriminatory purpose and (2) the remaining provisions are severable.

Shultz, 416 U.S. 21, 44-45, 68-69, 76, 94 S.Ct. 1494, 1509, 1521, 1524-25, 39 L.Ed.2d 812 (1974). Moreover, it is well settled that "a party may challenge a licensing statute regardless of whether he or she was denied a permit, or whether one has ever been sought." *Fernandes v. Limmer*, 663 F.2d 619, 625 (5th Cir. Unit A Dec. 1981), *cert. dismissed*, 458 U.S. 1124, 103 S.Ct. 5, 73 L.Ed.2d 1395 (1982); *see also, e.g., Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 151, 89 S.Ct. 935, 938, 22 L.Ed.2d 162 (1969).

Scientology's interest in avoiding challenged regulation is greater than the minimum interest in the outcome of a lawsuit required for standing. Just as the Establishment Clause "does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not," *Engel v. Vitale*, 370 U.S. 421, 430, 82 S.Ct. 1261, 1267, 8 L.Ed.2d 601 (1962), so also does the clause prohibit the casting of official disfavor upon a particular sect even though its members are not directly regulated. Religious groups and their members that are singled out for discriminatory government treatment by official harassment or symbolic conduct analogous to defamation have standing to seek redress in federal courts. *Church of Scientology v. Cazares*, 638 F.2d 1272, 1279-80 (5th Cir.1981); *see also, e.g., Allen v. Wright*, 468 U.S. 737, 755, 104 S.Ct. 3315, 3326, 82 L.Ed.2d 556 (1984) (noting that stigmatic injury associated with invidious official conduct is cognizable for standing purposes if the plaintiff is directly affected).

The question of standing is distinct from the broader issues concerning the merits of Scientology's case. Therefore, we would not require Scientology to prove that it is a bona fide religion entitled to First Amendment protection in order to obtain standing, any more than we would require a contract claimant to demonstrate that it

is a party to a valid agreement before invoking jurisdiction in an ordinary private law dispute. *See Larson v. Valente*, 456 U.S. 228, 254 n. 30, 102 S.Ct. 1673, 1689 n. 30, 72 L.Ed.2d 33 (1982) (finding standing to challenge regulation, but noting "[n]othing in our opinion suggests that appellants could not . . . put the Church to the proof of its bona fides as a religious organization"). Moreover, in our view the facts considered by the district court, 756 F.Supp. at 1509-11, provide much more than "a sufficiently strong demonstration that [Scientology] is a religion to overcome any prudential standing obstacles to consideration of [its] Establishment Clause claim" and its free exercise claim, *Valente*, 456 U.S. at 244 n. 16, 102 S.Ct. at 1683 n. 16, assuming for present purposes that such a prudential obstacle exists.

Nevertheless, we do not accept the district court's application of the "zone of interests" requirement for standing to raise a First Amendment challenge under § 1983, *see* 756 F.Supp. at 1509-12. The requirement that "the interest sought to be protected by the complainant [must be] *arguably* within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question," *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153, 90 S.Ct. 827, 830, 25 L.Ed.2d 184 (1970) (emphasis added) (hereinafter *ADAPSO*), was first developed as a limitation on judicial review of agency action under the Administrative Procedure Act ("APA"). The APA provides that a plaintiff must be adversely affected by challenged action "within the meaning of a relevant statute." 5 U.S.C. § 702. The Supreme Court has used a similar standard to determine whether particular federal statutes create actionable "rights" under § 1983, which creates a federal cause of action for "the deprivation of any rights, privileges, or immunities secured by the Constitution and

laws." [6] The Court has undertaken the same zone of interests inquiry to determine whether a particular constitutional provision creates rights intended by Congress to be enforceable under § 1983.[7]

The zone of interest requirement is a prudential standing doctrine, not mandated directly by Article III. *Allen v. Wright*, 468 U.S. at 751, 104 S.Ct. at 3324; *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 474-75, 102 S.Ct. 752, 760, 70 L.Ed.2d 700 (1982). Whatever the nature of the inquiry in the absence of congressional legislation, the Court's precedents show that the zone of interests analysis under § 1983 is limited to ascertaining whether the substantive constitutional or statutory provision confers rights intended by the legislature to be enforceable under the remedial statute. *See also Holmes v. Securities Investor Protection Corp.*, —— U.S. ——, ——, 112 S.Ct. 1311, 1328, 117 L.Ed.2d 532 (1992) (Scalia, J., concurring) (zone of interests test is an "ele-

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[6] *Compare Suter v. Artist M.*, —— U.S. ——, 112 S.Ct. 1360, 118 L.Ed.2d 1 (1992) (holding § 1983 remedy unavailable for violation of vaguely defined statutory "right") *with Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 508-10, 110 S.Ct. 2510, 2516-17, 110 L.Ed.2d 455 (1990) (finding definite and enforceable "right") *and Wright v. Roanoke Redev. & Hous. Auth.*, 479 U.S. 418, 431-32, 107 S.Ct. 766, 774-75, 93 L.Ed.2d 781 (1987) (finding specific enforceable "right" defined by administrative regulations that clarified statutory language).

[7] *Compare Dennis v. Higgins*, 498 U.S. 439, 449, 111 S.Ct. 865, 872, 112 L.Ed.2d 969 (1991) (Commerce Clause creates rights enforceable under § 1983) *and Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 321 n. 3, 97 S.Ct. 599, 603 n. 3, 50 L.Ed.2d 514 (1977) (victims of discriminatory taxation are within "zone of interests" protected by Commerce Clause) *with Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 110 S.Ct. 444, 107 L.Ed.2d 420 (1989) (Supremacy Clause by itself was intended to provide no enforceable "rights" under § 1983) *and Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 99 S.Ct. 1905, 60 L.Ed.2d 508 (1979) (same).

ment of statutory standing"). The test does not require the plaintiff to show an identifiable "legal interest" that may entitle him to relief. *ADAPSO*, 397 U.S. at 153-56, 90 S.Ct. at 830-31; *see also Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 399-400, 107 S.Ct. 750, 757, 93 L.Ed.2d 757 (1987); *Valente*, 456 U.S. at 254 n. 30, 102 S.Ct. at 1689 n. 30. The test requires only that the relationship between the plaintiff's alleged interest and the purposes implicit in the substantive provision be more than "marginal[]." *Securities Indus. Ass'n*, 479 U.S. at 399, 107 S.Ct. at 757.

Therefore the district court erred when it investigated the merits of Scientology's claim by evaluating whether it is in fact a religion. Moreover, it is clear that the First Amendment creates enforceable "rights" under § 1983. Any citizen's interest in preventing violations of those rights is more than marginally related to the constitutional provision, which protects the public at large as well as the individual plaintiff from government invasion of religious, political and intellectual activity, although requirements other than the zone of interests test may preclude a finding of standing. *Cf. Valley Forge*, 454 U.S. at 478-87, 102 S.Ct. at 762-67 (holding citizens' generalized interest in preventing establishment of religion by federal government insufficient to confer standing without allegations that tax funds were improperly collected or expended by Congress). *See generally Warth v. Seldin*, 422 U.S. 490, 501, 95 S.Ct. 2197, 2206, 45 L.Ed.2d 343 (1975). Thus, the complaint on its face alleges interests within the zone arguably protected by the constitutional provision. Since we have already held that all other requirements are satisfied, Scientology has standing.

VI. STANDARD OF APPELLATE REVIEW

A motion for summary judgment may be granted only if not genuine dispute remains as to any material fact and the moving party is entitled to judgment as a matter

of law. Fed.R.Civ.P. 56(c). As with all questions of law, we review the district court's order granting summary judgment under the de novo standard of review. *See Woodruff v. United States Dep't of Labor,* 954 F.2d 634, 636 (11th Cir.1992) (per curiam).

> The moving party bears the initial burden to show the district court, by reference to materials on file, that there are no genuine issues of material fact that should be decided at trial. Only when that burden has been met does the burden shift to the non-moving party to demonstrate that there is indeed a material issue of fact that precludes summary judgment.

Clark v. Coats & Clark, Inc., 929 F.2d 604, 608 (11th Cir.1991). With these principles in mind, we address the contentions of the parties.

VII. DISCRIMINATORY PURPOSE

Under the Establishment Clause jurisprudence which has followed *Lemon v. Kurtzman,* 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971), courts undertake a three-part analysis of challenged legislation. "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, . . . ; finally, the statute must not foster 'an excessive government entanglement with religion.' " 403 U.S. at 612-13, 91 S.Ct. at 2111 (citations omitted). Only if all three criteria are satisfied may the law be upheld. As the district court correctly recognized, "the three-part *Lemon* test remains the basic standard of judicial review in Establishment Clause cases." 756 F.Supp. at 1513; *see, e.g., Hernandez,* 490 U.S. at 695-96 & n. 11, 109 S.Ct. at 2146-47 & n. 11.

A. *Standard of Judicial Review*

Judicial review of governmental purpose is deferential. "A religious purpose alone is not enough to invalidate an act of a state legislature. The religious purpose must predominate." *Edwards v. Aguillard,* 482 U.S. 578, 599, 107 S.Ct. 2573, 2586, 96 L.Ed.2d 510 (1987) (Powell, J., concurring) (citations omitted). Thus, a statute is invalid only if it "does not have a *clearly secular* purpose." *Wallace v. Jaffree,* 472 U.S. 38, 56, 105 S.Ct. 2479, 2489-90, 86 L.Ed.2d 29 (1985) (emphasis added); *see, e.g., Church of Scientology v. Commissioner,* 823 F.2d at 1321. Nevertheless, the City cannot overcome the first *Lemon* prong merely by articulating a legitimate purpose. "[N]o legislative recitation of a supposed secular purpose can blind us" to an enactment's "pre-eminent purpose." *Stone v. Graham,* 449 U.S. 39, 41, 101 S.Ct. 192, 194, 66 L.Ed.2d 199 (1980) (per curiam).

Inquiry into legislative purpose begins with interpreting the law itself. "The plain meaning of the statute's words, enlightened by their context and the contemporaneous legislative history [or explained by the interpretation of a responsible administrative agency], can control the determination of legislative purpose." *Aguillard,* 482 U.S. at 594, 107 S.Ct. at 2583 (citations omitted). If the legislature's stated purpose is not actually furthered by the enactment then that purpose is disregarded as being insincere or a sham. *Id.,* 482 U.S. at 586-87, 107 S.Ct. at 2579. Even if the proffered purpose is not a sham, the court must evaluate the effect of the statute's provisions and "consider[] the historical context of the statute . . . and the specific sequence of events leading to [its] passage . . . ," *id.,* 482 U.S. at 595, 107 S.Ct. at 2583 (citations omitted); *see, e.g., Jaffree,* 472 U.S. at 59-60, 105 S.Ct. at 2491; *Valente,* 456 U.S. at 253-55, 102 S.Ct. at 1688-89; *see also Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.,* 429 U.S. 252, 267, 97 S.Ct.

555, 564, 50 L.Ed.2d 450 (1977) (noting that Fourteenth Amendment challenge invokes inquiry into "historical background" and "specific sequence of events" preceding enactment); *Hunter v. Underwood*, 471 U.S. 222, 228, 105 S.Ct. 1916, 1920, 85 L.Ed.2d 222 (1985); *cf. County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 606, 109 S.Ct. 3086, 3107, 106 L.Ed.2d 472 (1989) (applying the effects criterion of *Lemon* by evaluating the "particular contexts" in which the government acts).

A statute in which an impermissible purpose predominates is invalid even if the legislative body was motivated in part by legitimate secular objectives. Thus, for example, even if the ordinance in fact furthers a secular purpose, the "actual purpose" may in certain cases be found by asking "whether the government intends to convey a message of endorsement or disapproval of religion," *Lynch v. Donnelly*, 465 U.S. 668, 690-91, 104 S.Ct. 1355, 1368, 79 L.Ed.2d 604 (1984) (O'Connor, J., concurring). *See Jaffree*, 472 U.S. at 56, 105 S.Ct. at 2489-90.[8] If the "pre-eminent purpose" is illicit then the law is void. *Stone*, 449 U.S. at 41, 101 S.Ct. at 194.

Although the Court stated in *Bowen v. Kendrick*, 487 U.S. 589, 108 S.Ct. 2562, 101 L.Ed.2d 520 (1988), that a statute is void only if "motivated *wholly* by an impermissible purpose," 487 U.S. at 602, 108 S.Ct. at 2570 (emphasis added), we do not believe that this statement

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[8] This newly articulated principle that creation of the appearance of official disapproval for a sect may constitute a violation of the Establishment Clause appears to have overruled in part *Church of Scientology v. Cazares*, 638 F.2d 1272 (5th Cir. Mar. 1981), in which the court held that defamatory public condemnation by former Clearwater mayor Gabriel Cazares did not violate Scientology's civil rights and could not, consistent with the mayor's freedom of expression, be condemned under state law. *See also Aguillard*, 482 U.S. at 585, 107 S.Ct. at 2578; *cf. Lee v. Weisman*, —— U.S. ——, ——, 112 S.Ct. 2649, 2655-57, 120 LEd. 2d 467 (1992).

was intended to overrule the "predominate" standard of *Aguillard*, the "clearly secular" standard of *Jaffree* or the "preeminent" standard of *Stone*. First, the statement in *Kendrick* was dictum. "[T]he [statute] was motivated *primarily*, if not *entirely*, by a legitimate secular purpose." *Kendrick*, 487 U.S. at 602, 108 S.Ct. at 2571 (emphases added). Second, we do not believe the Court would have overruled the principle of deferential yet searching analysis applied to questions of legislative purpose so recently (in *Aguillard* and *Jaffree*), and so broadly (for example, in *Underwood* and *Metropolitan Housing*) without explicitly acknowledging its intention to do so. Instead, the Court simply cited *Donnelly* and *Stone* with apparent approval. *See Kendrick*, 487 U.S. at 602, 108 S.Ct. at 2570. Third, the Court's statement in *Stone* that "Kentucky's statute requiring the posting of the Ten Comandments in public schoolrooms had *no* secular legislative purpose, and is therefore unconstitutional," 449 U.S. at 41, 101 S.Ct. at 193 (emphasis added), does not represent a holding that *any* secular purpose is sufficient to validate an enactment. *Cf. Stone*, 449 U.S. at 43-47, 101 S.Ct. at 195-96 (Rehnquist, J., dissenting) (arguing that teaching children about the secular significance of the Ten Commandments is a sufficient legislative purpose). Finally, adopting the standard suggested by the *Kendrick* dictum would make *Lemon*'s purpose criterion a virtual dead letter, for "[r]arely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern . . . ," *Metropolitan Housing*, 429 U.S. at 266, 97 S.Ct. at 563.

Inexplicably, the City continues to argue that its purpose in enacting the ordinances is irrelevant to Scientology's allegation of an Establishment Clause violation. (Appellees' Br. at 48). As discussed above, the Supreme Court has unmistakably rejected this contention, most recently in *Hernandez*, in which the Court invoked the test of whether the challenged law "was born of animus

to religion in general or Scientology in particular." 490 U.S. at 696, 109 S.Ct. at 2147. The cases relied upon by the City, *Palmer v. Thompson*, 403 U.S. 217, 224-26, 91 S.Ct. 1940, 1944-45, 29 L.Ed.2d 438 (1971) (upholding against equal protection challenge city decision to close swimming pools rather than operate them on racially integrated basis), and *United States v. O'Brien*, 391 U.S. 367, 382-86, 88 S.Ct. 1673, 1682-84, 30 L.Ed.2d 672 (1968) (upholding against free speech challenge federal statute prohibiting burning of draft card), are obviously distinguishable, as neither involved a claim arising under the Establishment Clause. Contrary to the dictum of *Palmer* that judicial invalidation of a law on the basis of improper legislative purpose might be "futil[e]" because the statute "would presumably be valid as soon as the legislature or relevant governing body repassed it for different reasons," 403 U.S. at 225, 91 S.Ct, at 1945, the requirement that a court entertaining an Establishment Clause challenge must consider "the specific sequence of events leading to [re-]passage of the statute," *Aguillard*, 482 U.S. at 595, 107 S.Ct. at 2583, embodies a sensitivity to the political realities of the legislative process that is amply refined to discern such a crude attempt to circumvent federal judicial determination.[9]

Furthermore, *Palmer*'s holding simply has not withstood the test of time, even in the Fourteenth Amendment equal protection context. *See, e.g., Personnel Adm'r v. Feeney*, 442 U.S. 256, 99 S.Ct. 2282, 60 L.Ed.2d 870 (1979) (sex discrimination); *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976)

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[9] In any event, we are not inclined to accord too much weight to *Palmer*. Four Justices dissented and Justice Blackmun's concurrence makes clear that he joined the majority only because facts developed in the record and conceded at oral argument rebutted the allegation of discriminatory motive. 403 U.S. at 228-30, 91 S.Ct. at 1946-47 (Blackmun, J., concurring). *See generally Underwood v. Hunter*, 730 F.2d 614, 617 n. 7 (11th Cir.1984), *aff'd*, 471 U.S. 222, 105 S.Ct. 1916, 85 L.Ed.2d 222 (1985).

(race discrimination); *see also City of Mobile v. Bolden*, 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980) (race discrimination under the Fourteenth and Fifteenth Amendments). "Once racial discrimination is shown to have been a 'substantial' or 'motivating' factor behind enactment of the law, the burden shifts to the law's defenders to demonstrate that the law would have been enacted without this factor." *Underwood*, 471 U.S. at 228, 105 S.Ct. at 1920. The Court's 1968 decision in *O'Brien*, holding in the free speech context "that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit motive," 391 U.S. at 383, 88 S.Ct. at 1682, may also effectively have been overruled in relevant part. In *Pickering v. Board of Education*, 391 U.S. 563, 568, 88 S.Ct. 1731, 1734, 20 L.Ed.2d 811 (1968), *Perry v. Sinderman*, 408 U.S. 593, 597, 92 S.Ct. 2694, 2697, 33 L.Ed.2d 570 (1972), and *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 283-84, 97 S.Ct. 568, 574, 50 L.Ed.2d 471 (1977), the Court held that improper retaliatory purpose would invalidate action directed against a government employee's protected speech. In *Metropolitan Housing*, 429 U.S. at 270 n. 21, 97 S.Ct. at 566 n. 21, and *Mt. Healthy*, 429 U.S. at 287, 97 S.Ct. at 576, both decided on the same day, the Court applied identical standards of proof to a zoning action allegedly motivated by racial considerations and an employment action allegedly motivated by a purpose to chill free speech, the same standard that it would later apply in *Underwood* to determine racially discriminatory legislative purpose. *See also Lee v. Russell County Bd. of Educ.*, 684 F.2d 769, 773-74 (11th Cir.1982) (applying identical *Mt. Healthy* standards to free speech and equal protection challenges to government employment action). These decisions, which treat the evaluation of governmental purpose in challenges under the First Amendment as identical to the inquiry under the Equal Protection Clause, suggest that action by any branch of government

may be invalid if the challenger shows the action was partly motivated by purposes offensive to the Free Speech Clause and the defender cannot prove that illicit motivation was not in fact the cause of the action. *See Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 579-80, 585, 103 S.Ct. 1365, 1364-65, 1372, 75 L.Ed.2d 295 (1983).[10]

If *Hernandez, Aguillard, Jaffree, Stone* and *Lemon* were not enough to show that the City's contention is meritless, our holding in *American Civil Liberties Union v. Rabun County Chamber of Commerce*, 698 F.2d 1098, 1110-11 (11th Cir.1983) (per curiam), that improper religious motive invalidates official action challenged under the Establishment Clause, would suffice. We readily conclude that a predominantly or pre-eminently sectarian purpose will invalidate an otherwise permissible law under the Establishment Clause. We therefore turn to consider the allocation of proof in applying the purpose criterion of *Lemon*, and conclude that the frequently invoked *Mt. Healthy* standard is the most appropriate. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 252-54, 109 S.Ct. 1775, 1792-93, 104 L.Ed.2d 268 (1989) (plurality opinion) (applying *Mt. Healthy* to private intentional sex discrimination case under Title VII); *id.*, 490 U.S. at 258-60, 109 S.Ct. at 1795 (White, J., concurring) (same); *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 403, 103 S.Ct. 2469, 2475, 76 L.Ed.2d 667 (1983) (applying *Mt. Healthy* to discriminatory anti-union discharge case); *Thompkins v. Morris Brown College*, 752

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[10] A sharply divided Court recently relied on *O'Brien* for guidance in evaluating regulation of non-verbal expressive conduct, such as burning draft cards or dancing nude, that also has significant components lacking expressive content. *See Barnes v. Glen Theatre, Inc.*, —— U.S. ——, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991). Only Justice Souter alluded to *O'Brien*'s holding concerning legislative purpose, although he would have recognized that illicit purpose is dispositive in the Establishment Clause context. *Id.*, —— U.S. at —— & n. 1, 111 S.Ct. at 2469 & n. 1 (Souter, J., concurring in the judgment).

F.2d 558, 563-64 (11th Cir.1985) (anticipating *Hopkins*); *Hayes v. Shelby Mem. Hosp.*, 726 F.2d 1543, 1548 (11th Cir.1984) (applying *Mt. Healthy* to Pregnancy Discrimination Act).

To be sure, the competing interests implicated in an Establishment Clause case may differ from those in free speech cases, as well as those involved in discrimination cases under the equal protection aspect of the Fourteenth Amendment, the disparate treatment aspect of Title VII, the Pregnancy Discrimination Act and the National Labor Relations Act. Nevertheless, the Establishment Clause requirement that a statute must have a "clearly secular" purpose, over which any sectarian motivation does not "predominate," is consistent with the allocation of proof adopted by the Court in *Hopkins, Underwood, Transportation Management, Metropolitan Housing* and *Mt. Healthy* and by our court in *Hayes*. Just as the plurality *in Hopkins* and Justice White were "not inclined to say that the public policy against firing employees because they spoke out on issues of public concern [in violation of the First Amendment] or because they affiliated with a union is less important than the policy against discharging employees on the basis of their gender," 490 U.S. at 254, 109 S.Ct. at 1793, we are not inclined to conclude that the constitutional prohibition of laws tending to establish one or more official religions is less important than any of those policies just addressed. "Each of these policies is vitally important, and each is adequately served by requiring proof by a preponderance of the evidence [that the defendant would have reached the same result in the absence of improper motivation]." *Id.* (rejecting proposal to require defendant's proof by clear and convincing evidence). When a plaintiff shows by direct evidence that a sectarian or religious purpose was a substantial or motivating factor, the burden shifts to the defendant to show by a preponderance of the evidence that action challenged under the Establishment Clause would have been undertaken even in the absence of such

improper considerations. *See Aguillard*, 482 U.S. at 595, 107 S.Ct. at 2583 (citing *Metropolitan Housing*); *cf. Gillette v. United States*, 401 U.S. 437, 451-52, 91 S.Ct. 828, 837, 28 L.Ed.2d 168 (1971) (requiring challenger to show the absence of legitimate purpose when there is no direct evidence of sectarian motive).

B. *Discussion*

The district court's opinion did not expressly address Scientology's claim of discriminatory purpose, *see* 756 F.Supp. at 1505, 1516, although the City concedes that the claim was vigorously argued throughout the course of this litigation. Having granted the City's motion for summary judgment, however, the district court did deny Scientology's motion to alter or amend the judgment on the basis of this issue. [R7-168-1; R6-147-4-9.]

Scientology points to various materials, including newspaper articles, that it submitted to the district court and which it argues tend to show sectarian motivation. Even if they would have been inadmissible at trial (and we do not hold that they would have been), such materials were appropriately submitted by the non-moving party in opposition to the motion for summary judgment. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 319, 324, 106 S.Ct. 2548, 2551, 2553, 91 L.Ed.2d 265 (1986) (non-moving party opposing motion for summary judgment with hearsay documents need not "produce evidence in a form that would be admissible at trial in order to avoid summary judgment"); *see also Offshore Aviation v. Transcon Lines, Inc.*, 831 F.2d 1013, 1015 & n. 1 (11th Cir.1987) (per curiam) ("The claim by [the moving party] that the letter is inadmissible hearsay does not undercut the existence of any material facts the letter may put into question.").[11]

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[11] Although the Former Fifth Circuit had previously held that hearsay newspaper articles are ordinarily not competent evidence that a court may consider in ruling on a motion for summary

Construed in the light most favorable to the nonmoving party, as they must be in evaluating a motion for summary judgment, *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157, 90 S.Ct. 1598, 1608, 26 L.Ed.2d 142 (1970), these materials provide explicit evidence that the city commission conducted its legislative process from beginning to end with the intention of singling out Scientology for burdensome regulation. The record shows a widespread political movement, apparently driven by an upsurge of sectarian fervor,[12] intent on driving Scientology from Clearwater. It also shows that various members of the commission had made their affiliation with that movement known to the public in the plainest terms possible, not only in the official legislative record leading to adoption of the ordinances but also in documents concerning unrelated government activity and in extemporaneous remarks.

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judgment under Federal Rule of Civil Procedure 56(e), *Pan-Islamic Trade Corp. v. Exxon Corp.*, 632 F.2d 539, 556-57 (5th Cir.1980), *cert. denied*, 454 U.S. 927, 102 S.Ct. 427, 70 L.Ed.2d 236 (1981); *cf. Victoria L. ex rel. Carol A. v. District School Bd.*, 741 F.2d 369, 373 (11th Cir.1984) (dictum), this holding appears to have been overruled in part by *Celotex. See Pennington v .Vistron Corp.*, 876 F.2d 414, 426 & n. 15 (5th Cir.1989) (assuming for purposes of argument that hearsay medical journal article was competent to counter motion for summary judgment). While decisions of the Fifth Circuit rendered before October 1, 1981, are binding upon panels of this court, *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), we must disregard them if necessary to give effect to a decision of the Supreme Court of the United States. *E.g., United States v. Giltner*, 972 F.2d 1563, 1566 (11th Cir.1992). *Celotex* does not modify *Pan-Islamic* with respect to the materials that may be submitted by the *moving* party. As noted, we express no opinion concerning the admissibility of these materials at trial, a matter that is initially committed to the sound discretion of the district court.

[12] *See Epperson v. Arkansas*, 393 U.S. 97, 98, 89 S.Ct. 266, 267, 21 L.Ed.2d 228 (1968).

The city commission hired a Boston lawyer named Michael Flynn to coordinate the publicly televised hearings that eventually led to adoption of the 1983 and 1984 Ordinances. [R1-18-Exh. S.] As reported in the Clearwater media and well known to the commission and the public, Flynn had dedicated much of his career to fighting Scientology. It was Flynn who first suggested adoption of a charitable solicitation ordinance, the avowed purpose of which was to target Scientology. [*Id.* Exh. K.] In his written report Flynn appealed to the prejudices of his clients when he observed that such an ordinance would require lengthy and costly litigaton to defend but that Scientology has rarely been successful in any judicial system in the world, including numerous cases in the U.S., in using its religious front to conceal its activities." [*Id.* Exh. K-2.] (He did observe that Scientology was likely to achieve preliminary success in such litigation, noting "the only analogy I can give is it's like dealing with the Nazis. They will litigate right to the bunker." [*Id.* Exh. N1-13.)]

Flynn told the commission that a primary purpose of the statute was the collection of data to support the City's position (since abandoned for purposes of this case) that Scientology is not a bona fide religion and therefore is not entitled to exemption from the payment of property taxes. [*Id.* N-1-9.] Although proper enforcement of property tax laws is a legitimate local governmental interest, the highly charged political context in which it was pursued created a risk that the taxation purpose was a mere pretext. Certainly, the City had no interest in depriving Scientology of its privilege to pay the lower non-profit rate for United States mail bulk postage. [*Id.* Exh. N-3.] Nor did the City have any interest in confounding Scientology's state and federal income tax exemptions. [*E.g., id.* Exh. 0-8-9.] Rather, viewed in the light most favorable to Scientology, these statements of purpose reveal an underlying objective to employ the tax laws to discriminate against Scientology, a purpose that

is patently offensive to the First Amendment. *See Powell v. United States*, 945 F.2d 374 (11th Cir.1991).

As late as June 1983, commission members continued to express concern over suggestions that the proposed ordinance would "create a hardship for legitimate organizations," including other "churches," [R1-18-Exh. ZZ-33 to 34, 36,] and ordered further consideration of the matter by City Attorney Thomas Bustin. [*Id.* Exh. CCC, EEE (transcript of consultation between Bustin and Episcopal and Jewish representatives).] Viewed in the light most favorable to Scientology, we may interpret this response as a sign of deference to the main-line denominations. Yet when identical concerns had been raised by Scientology at a public meeting, [*id.* Exh. HH-49, 52-57,][13] the commission's entire response had been limited to an argumentative discussion in which members of the body debated the constitutionality of the ordinance with Scientology's advocate. [*Id.* at 57-64.][14] Clearwater did not invite Scientology representatives to consult with Bustin. According to City Manager Anthony Shoemaker, "Why should we? We've heard their objections over and over again." [*Id.* Exh. FFF-3.][15]

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[13] Those concerns included the scope of the recordkeeping burden, the potential for governmental entanglement in matters of church organization, the adequacy of existing anti-fraud statutes, the need to avoid governmental participation in intra-denominational disputes, the questionable constitutionality of the measure and the likelihood of expensive litigation to defend it.

[14] The tone of that discussion was apparently determined at the outset when then-Mayor Charles LeCher took the opportunity to remind the assembly of the Scientology lawyer's allegiance. [R1-18-Exh. HH-57; *see also* R5-108-Exh. 1-Vol. 1-15-17 (transcript of denial of Scientology motion for leave to make opening statement at televised hearings); *id.* Exh. 2-Tape 1 (videotape of same).]

[15] Shoemaker apparently was not a voting member of the commission, although he and Bustin participated as panelists in the televised hearings.

Scientology also points to a number of changes embodied in successive drafts of the 1983 Ordiance, changes inserted at the instance of more popular denominations and other charities. [*See id.* Exh. DD, FF, HH.] For example, the 1983 Ordinance was redrafted to remove any requirement that charitable organizations report or retain records concerning the identiy of individual donors, [*id.* Exh. ZZ-4,] a provision that mainline charities and churches suggested might discourage contributions. Similarly, the exemption for small-scale solicitations was adopted in response to more respected religious groups' concern for affiliated charities based outside Clearwater whose local activities were likely to be regular but small in scope. [*Id.* Exh. EEE; *see generally id.* Exh. III-30; *id.* Exh. JJJ.] Such tinkering creates a significant "risk of politicizing religion," *Valente*, 456 U.S. at 253-55, 102 S.Ct. at 1688-89, a danger that for purposes of summary judgment appears to have been realized in the present case.

Mayor Kathleen Kelly and others frequently voiced concern that main-line denominations opposed to the ordinance might express their dissention by refusing to comply with its provisions; no such solicitude was ever expressed concerning Scientology's objections. [R1-18-Exhs. MMM, III-6-15.] In voting against the 1983 Ordinance, Commissioner James Berfield noted one of the competing concerns before the body as "Will the ordinance be so cumbersome on the legally recognizable religions and charitable organizations that it will be burdensome to them?" [*Id.* Exh. OOO-6.] Voting in favor of the ordinance, Commissioner William Justice observed:

> [A]fter the amendments, I talked to a number of people in churches and charitable organizations, and they convinced me that [the 1983 Ordinance] would not work any hardship on them. They felt it was a good ordinance. Any [sic] of the ministers—I won't say all of them but many of them—ministers whom

> I'm very familiar with and trust their opinion said it would not affect their organization either way and they would be glad to show their records. Consequently, I changed my opinion and I will vote for the ordinance.

[*Id.* Exh. 000-9-10.]

In response to concerns over the cost of litigation to defend the ordinances, Commissioner James Calderbank noted in 1981 the relatively large size of the City's budget and further observed "[a]nd I think number two, even emotionally, we are representatives of the citizens ([then-Commissioner] KELLY agreeing here) and I think in the last few elections, [Commissioner] Rita [Garvey] was the first one, and [then-Mayor] Charlie [LeCher], that I heard years ago say, We've got to find a legal route." [*Id.* Exh. N-1-17.] This reference to the continuing political movement against Scientology during election campaigns is amply corroborated by unrebutted newspaper clippings contained in several volumes of the record. Then-candidate Calderbank declared in 1980 that "I will explore every avenue and support every legal means of encouraging the Scientologists to leave. . . . I am a doer, not a talker." [*Id.* Exh. D-7.] In 1981 candidate Calderbank "said that Scientology 'has to be treated like a cancer—first you arrest its growth, then remove it from the city . . . or nullify its existence.'" [*Id.* Exh. D-13 (ellipses in original).] During his successful 1983 re-election campaign Calderbank again emphasized his opposition to Scientology, although he remained careful to articulate his respect for the law.[18] Mayor LeCher, successfully seeking re-election in 1981, characterized Scientology as a "dark cloud . . . that is upon us." [*Id.* Exh.

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[18] Speaking on the subject of Scientology, Calderbank said, "[t]he public record gives us a reason to enact ordinances to make sure fraud is not used in solicitation and the money goes for charitable purposes." [R1-18-Exh. D-32.]

D-16.][17] Candidate Rita Garvey, successfully seeking election to the commission in 1980, entertained a "position on Scientology [that] is forceful but balanced with a concern that the rule of law be followed. Mrs. Garvey says that Scientologists lie, steal and cheat. She feels the community must work to destroy the organization at the top." [*Id.* Exh. E-2.] Then-Commissioner Richard Tenney, unsuccessfully seeking re-election in 1980, "said his campaign will focus on one issue—forcing Scientology to leave town." [*Id.* Exh. D-8.][18] Candidate Justice, successfully seeking election to the commission in 1983, stated his position that the City should "[u]se every legal means to show that they [Scientology] are a fraud." [*Id.* Exh. D-33.] During a press conference Flynn and another person engaged in a colloquy to the effect that enacting a charitable solicitation ordinance would drive Scientology out of Clearwater. [*Id.* Exh. N-7.]

Mayor LeCher gave a television interview concerning the hearings in which the following exchange took place.

> Interviewer: . . . Respond to the argument that at least some of the church members raise that this is, in essence, an organized effort to run [Scientology] out of town.
>
> LeCher: It is an organized effort of the City of Clearwater, . . . [ellipses in original] Where ever I go they say, "What about the Scientologists?" They seem to care more [about] that than the boat, than the pier, or the hotel, or whatever. It has been proven that street corner confrontation in politics no longer work in this issue. So we believe that govern-

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[17] LeCher was not mayor when the commission voted to adopt the ordinances. He did, however, oversee the televised legislative hearings that preceded his defeat by former commissioner Kelly in 1983.

[18] Tenney was not a member of the commission during the hearings or when it voted to adopt the ordinances.

> ment should be of laws. And we are trying to carry out the wish of the people. Again, if there is nothing there then there is nothing there. And [the Scientologists] should want to come to a conclusion on this issue. . . .
>
> Interviewer: Would you like to see them run out of town?
>
> LeCher: The county has a lawsuit with them. I don't really care to comment publicly how I honestly feel with the threat of any possible litigation. But I would like to say I yearn for the olden days when the Fort Harrison Hotel was full of Canadian tourists spending lots of money in the city of Clearwater. . . . .
>
> Interviewer: Is anyone other than the Scientologists being brought before these hearings?
>
> LeCher: Not that I know of. I don't know anyone else that is claiming to be a religion that is not.

[*Id.* Exh. Q-2 to 3; *see also id.* Exh. W-13, ¶ 21.] As late as August 1983, Mayor Kelly was reported to have expressed "frustrati[on]" that the First Amendment restricted the City's ability to prevent Scientology from distributing literature in public fora, while Calderbank called for increased police patrols to deal with this problem. [*Id.* Exh. FFF-3.] [19]

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[19] Other evidence of animus toward Scientology can be found in the commission's derisive response to letters submitted by the group at the hearings.

> CALDERBANK: There's a typo on the second page of the one where it says it should be. We really could return this. (giggling from a woman.)
>
> GARVEY: I think you should get a paper shredder (to Flynn) [.]
>
> FLYNN: Among other things. . . .

[R1-18-Exh. N1-20; *see also, e.g.*, R5-108-Exh. 1-Vol. I-249-50.]

The City also considered but rejected proposals to employ its power of eminent domain to condemn Scientology property "even though the condemnation might put the organization out of business." [*Id.* Exh. O-16.] In response to concerns over the cost of acquiring and renovating the former hotel which Scientology had purchased in downtown Clearwater, Commissioner Calderbank observed: "There are other locations that *they* own that might be more practical." [*Id.* Exh. P-18 (emphasis added).] A newspaper article reported that Mayor LeCher had expressed reservations that "even if the move were successful, it would not guarantee Scientology will leave the city." [*Id.* Exh. P-30.] As late as December 1983, City Manager Shoemaker stated in an official memorandum that "I think total condemnation of all the Scientologist's [sic] property in the city might be a workable solution to this problem facing the City. This might even give them the needed boost to decide to relocate." [*Id.* Exh. QQQ-1.] In considering Flynn's proposal to create a special taxing zone in the downtown area and prohibit real estate conveyances to tax exempt owners, commissioners expressed concern that the impact of the action be limited to Scientology. [*See id.* Exh. P-25; *id.* Exh. KK-35-37.]

The City may have tried to conduct a second round of hearings to sanitize the legislative record and suggest a neutral motivation. [*E.g., id.* Exhs. ZZ, III, JJJ.] Whatever weight may be accorded this fact, the new legislative record is insufficient to warrant summary judgment in the face of all that had gone before. [*See also id.* Exh. LLL (commission delayed vote on 1983 Ordinance pending receipt of "important" information from disenchanted ex-Scientologists to "help bolster Clearwater's legal position").] Although it may not prove directly probative, we also note a Clearwater newspaper's 1983 opinion that "[t]his charitable solicitation ordinance was conceived as a means of attacking the Church of Scientology, and nothing the city does now can remove that defect." [*Id.*

Exh. UU; *see generally id.* Exh. DDD.] There is sufficient evidence supporting that conclusion to shift to the City the ultimate burden of showing, under all the circumstances, that it would have enacted the ordinance even without impermissible motive.[20] The same evidence precludes judgment as a matter of law for the City. We therefore reverse the district court's order of summary judgment in the City's favor. The district court's order denying summary judgment for Scientology is vacated, and the case is remanded for further proceedings concerning the *Lemon* purpose criterion. If the district court concludes that the City was improperly motivated then the entire ordinance will be invalid. No further proceedings aer necessary concerning *Lemon's* excessive entanglement analysis, however, in view of our discusson that follows.

VIII. EXCESSIVE ENTANGLEMENT

The three-prong *Lemon* inquiry also asks whether the challenged conduct "foster[s] 'an excessive government entanglement with religion.'" *Lemon*, 403 U.S. at 613, 91 S.Ct. at 2111 (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 674, 90 S.Ct. 1409, 1414, 25 L.Ed.2d 697 (1970)). Later decisions have clarified this aspect of the Establishment Clause in part. In *Jimmy Swaggart Ministeries v. Board of Equalization*, 493 U.S. 378, 110 S.Ct. 688, 107 L.Ed.2d 796 (1990), the Court held that the required recordkeeping and disclosure associated with

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[20] These references to the record do not reflect the only evidence tending to support Scientology's position. [*See generally, e.g.*, R5-108-Exh. 1 (transcript of hearings).] We express no opinion about the magistrate judge's discovery orders denying Scientology's motion to compel disposition testimony concerning the legislators' subjective thought processes. [R6-132; R5-115.] *But see Jaffree*, 472 U.S. at 56-57, 105 S.Ct. at 2490 (sponsor of legislation "confirmed this purpose before the District Court"); *cf., e.g., Branch v. Tunnell*, 937 F.2d 1382, 1385-88 (9th Cir.1991) (discussing prerequisites for discovery concering subjective intent or motive in a suit against officials who may also be entitled to qualified immunity based on objective considerations, and citing cases).

administering neutral collection of sales taxes on transfers of religious and other materials did not excessively entangle the government in church affairs. "[G]enerally applicable administrative and recordkeeping regulations may be imposed on religious organizations without running afoul of the Establishment Clause." 493 U.S. at 395, 110 S.Ct. at 698. Such "routine regulatory interaction which involves no inquiries into religious doctrine, no delegation of state power to a religious body, and no 'detailed monitoring and close administrative contact' between secular and religious bodies, does not of itself violate the nonentanglement command." *Hernandez*, 490 U.S. at 696-97, 109 S.Ct. at 2147 (citations omitted); *see also Tony & Susan Alamo Found. v. Secretary of Labor*, 471 U.S. 290, 305-06, 105 S.Ct. 1953, 1963-64, 85 L.Ed.2d 278 (1985) (holding that requirements of Fair Labor Standards Act foster no impermissible entanglement).

A. *Contentions of the Parties*

Scientology argues that the effect of the 1984 Ordinance is to mandate disclosure of its entire operation. By requiring disclosure of the purpose for which funds are and have been solicited and the uses to which funds will be and have been put, the ordinance in effect makes the entire functioning of the church a matter of public record, either directly through reporting in the registration form and retrospective filing or indirectly by means of the "private" statement and disclosure of supporting records. This effect is heightened by the further requirements of particular disclosures, such as the amount of funds spent on salaries, overhead and the like, and the names and addresses of every person in the organization with authority to spend its money. And Scientology contends that, because funds solicited in Clearwater may be spent anywhere in the world, the ordinance perforce requires

disclosure of its activities worldwide. *See generally* Code §§ 100.03(1), 100.03(8).[21]

Scientology further argues that the disclosure provisions "require disclosure of the financial affairs of churches and other voluntary associations and provide rights to members of a church (or other voluntary association[]) that they would not have absent the Ordinance. Thus, these requirements impose on a church the form of organization Clearwater deems proper . . . [and] removes from churches the ability to decide how they will govern and organize themselves." (Appellant's Br. at 18). Scientology contends, finally, that such an entanglement is categorically prohibited by Supreme Court precedent and can never be justified.

The City responds that these are merely "generally applicable administrative and recordkeeping regulations" and therefore permissible. Even if otherwise improper, it argues, the 1984 Ordinance is sufficiently closely tailored to serve the City's legitimate interest in preventing fraud.

B. *The Government Entanglement*

None of the recent cases discussed above addressed facts similar to the ones presented here. All of the challenged regulations imposed recordkeeping and disclosure obligations that were narrowly drawn to specific regulatory objectives. *See Jimmy Swaggart*, 493 U.S. at 394-97, 110 S.Ct. at 698-99 (sales tax on books and similar material); *Hernandez*, 490 U.S. at 696-98, 109 S.Ct. at 2147-48 (tax deductibility of contributions as quid pro quo); *Tony & Susan*, 471 U.S. at 305-06, 105 S.Ct. at 1963-64 (wage and hour regulation). None of the regulations required a church to divulge its entire budget and all its operations on a continuing basis to a large group of governmental and non-governmental persons. In

[21] Scientology raises a large portion of its revenues through its Clearwater activities.

contrast, the 1984 Ordinance mandates a "detailed monitoring and close administrative interaciton" by empowering the city clerk to review in detail the disclosure of proposed spending for the coming year and to assess disclosure of all such activities over the preceding year, by mandating public access to a detailed accounting of church expenditures, by opening the books and records to members of organizations employing the private statement and by involving criminal courts in enforcing these provisions. The disclosure and recordkeeping is "significantly more intrusive into religious affairs," *Tony & Susan*, 471 U.S. at 306, 105 S.Ct. at 1964, than that imposed by any of the regimes recently upheld by the Supreme Court.

The monitoring imposed by the 1984 Ordinance is just as "close" as the surveillance of parochial school expenditures condemned in *Aguilar v. Felton*, 473 U.S. 402, 105 S.Ct. 3232, 87 L.Ed.2d 290 (1985), and equally as "detailed" as the program at issue in that case, if not more so, for the 1984 Ordinance in effect requires recordkeeping and disclosure concerning *every* expenditure. As the Court noted in *Jimmy Swaggart*, even a generally applicable recordkeeping regulation is permissible only if "the statutory scheme requires *neither* the involvement of state employees in, *nor* on-site continuing inspection of, [the church's] day-to-day operations." 493 U.S. at 395, 110 S.Ct. at 699 (emphasis added). The 1984 Ordinance offends this principle because it involves executive and judicial authorities in every aspect of the church's activities, not only making them the ultimate arbiters of the appropriate level of disclosure to the church's members in all matters of ecclesiastical fiscal administration, but also conferring responsibility for apprising themselves and the public concerning such matters. The City's law violates the command that "[n]either a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*." *Everson v. Board of*

Educ., 330 U.S. 1, 16, 67 S.Ct. 504, 512, 91 L.Ed. 711 (1947).

Although it does not require continuous or on-site inspection by government employees, the private statement option for member solicitations subjects religious organizations to the continuous surveillance of their own members by requiring disclosure of all records underlying the statements upon request. The City's legislative officials may not delegate to an individual citizen a power that they do not possess themselves, no matter how intimate the individual's relationship with the subject of the regulation may be, when the exercise of that power by the City would have infringed impermissibly a fundamental liberty guaranteed under our Constitution. *Planned Parenthood v. Danforth*, 428 U.S. 52, 69-72, 96 S.Ct. 2831, 2841-42, 49 L.Ed.2d 788 (1976).

The potential for government invasion of church affairs is compounded by the ordinance's direct effect upon church hierarchy. By requiring a church to make detailed information about its activities available to members and the public, the ordinance has the direct effect of subtly shifting the balance of power between the laity and the central ecclesiastical authority. While democratic participation by individual members in the affairs of society is a cornerstone of our public life, government may not mandate such arrangements in private organizations. *March Fong Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 232-33, 109 S.Ct. 1013, 1025, 103 L.Ed.2d 271 (1989). In addition to this legislatively sanctioned reordering of church hierarchy, of course, the ordinance requires prosecutorial and judicial authorities to assure compliance with its provisions by investigation and criminal enforcement. In accomplishing these results the legislative arm of the City's government has impermissibly imposed its own preferences concerning the degree of disclosure to members concerning daily operations.

> By fiat it displaces one church administrator with another. It passes control of matters strictly ecclesiastical from one church authority to another. *It thus intrudes for the benefit of one segment of a church the power of the state into the forbidden area of religious freedom contrary to the principles of the First Amendment.*

Presbyterian Church v. Hull Mem. Presbyterian Church, 393 U.S. 440, 448, 89 S.Ct. 601, 606, 21 L.Ed.2d 658 (1969) (quoting *Kedroff v. St. Nicholas Cathedral,* 344 U.S. 94, 119, 73 S.Ct. 143, 156, 97 L.Ed. 120 (1952)). The interposition of official authority on behalf of a church's laity is equally as offensive to the Establishment Clause as the delegation of such authority to church leaders that was condemned in *Larkin v. Grendel's Den, Inc.,* 459 U.S. 116, 123, 103 S.Ct. 505, 510, 74 L.Ed.2d 297 (1982). For these reasons the recordkeeping and disclosure requirements of the 1984 Ordinance cannot be characterized as "routine."

This type of surveillance is not rendered permissible by virtue of the fact that it does not expressly require the clerk or the court to make an assessment of the religious content of Scientology's activities. *Cf. Jimmy Swaggart,* 493 U.S. at 396-97, 110 S.Ct. at 699. For the imposition of civil authority in matters of "church policy and administration" by itself may pose a "substantial danger that the State will become entangled in essentially religious controversies or intervene on behalf of groups espousing particular doctrinal beliefs." *Serbian Eastern Orthodox Diocese v. Milivojevich,* 426 U.S. 696, 710, 709, 96 S.Ct. 2372, 2381, 2380, 49 L.Ed.2d 151 (1976); *cf. Jones v. Wolf,* 443 U.S. 595, 603-04, 99 S.Ct. 3020, 3025-26, 61 L.Ed.2d 775 (1979) (holding that civil courts may apply only neutral principles of law to resolve disputes over church property).

The Fifth Circuit applied a settled principle when it declared that "the law is clear: civil courts are barred by

the First Amendment from determining ecclesiastical questions." *Simpson v. Wells Lamont Corp.*, 494 F.2d 490, 493 (5th Cir.1974); *accord, e.g., Natal v. Christian & Missionary Alliance*, 878 F.2d 1575 (1st Cir.1989). In applying this principle we must not "narrowly limit" its scope to actual

> differences in church doctrine. The cases negative such a strict view. A "spirit of freedom for religious organizations, an independence from secular control or m[a]nipulation[,] in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine" is reflected in the Supreme Court's decisions.

Simpson, 494 F.2d at 493 (quoting *Kedroff*, 344 U.S. at 116, 73 S.Ct. at 154). The district court erred when it concluded that "[t]he present situation does not involve an ecclesiastical dispute," 756 F.Supp. at 1521. To the contrary, the principle that civil authorities must abstain from interposing themselves in matters of church organization and governance is directly violated by the public financial, operational and organizational disclosures required of churches that solicit from members and the public and the alternative private statement procedures applicable to member solicitations.

The same excessive entanglement in church affairs that is triggered by member solicitation under the 1984 Ordinance occurs when churches solicit the public. The Court has never suggested that an excessive government entanglement that happens to involve church solicitation is mitigated by the fact that the public rather than the church's membership is the object of a request for funds. *See Valente*, 456 U.S. at 252-55, 102 S.Ct. at 1687-89 (noting that facial denominational preferences in law regulating public solicitation implicates excessive entanglement concerns). The ordinance provides for exactly the same public disclosure and exactly the same mechanisms for official monitoring and enforcement with respect to

both member and non-member solicitations.[22] The tendency toward establishing religion that inheres in laws requiring public disclosure and official surveillance of church finances and activities is the same whether the regulation is occasioned by solicitations of co-religionists or church outsiders. *See, e.g., Larkin,* 459 U.S. at 126-27, 103 S.Ct. at 511-12 (condemning entanglement of official and ecclesiastical authority in matters entirely external to church affairs). The effect of such disclosure upon the associational interests of members in maintaining the privacy of their activities is the same whether the church engages in public solicitation or not. Moreover, the state may never require churches to forego protected religious and speech activity like public solicitation, *see, e.g., Cantwell v. Connecticut,* 310 U.S. 296, 303-05, 60 S.Ct. 900, 903-04, 84 L.Ed. 1213 (1940), in order to avoid becoming entangled with civil authorities. We need not determine in the present case whether prohibiting such speech in the absence of entangling regulation would be adequately tailored to some substantial interest, although we doubt that such a blanket prohibition could be sustained. An unconstitutional entanglement may not be excused on the ground that it is imposed only as a condition of avoiding otherwise permissible regulation or as a prerequisite to receiving a valuable privilege. *See generally, e.g., Rutan v. Republican Party,* 497 U.S. 62, 72, 110 S.Ct. 2729, 2736, 111 L.Ed.2d 52 (1990).[23]

It is clear from the many entanglement cases that have involved direct regulation by executive rather than ju-

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[22] As already noted, the optional private statement for member solicitations is equally as offensive as the alternative public disclosure.

[23] For example, the Court in *Felton* condemned government entanglement in the administration of benefits to religious schools even though the schools could have escaped the entanglement by foregoing the benefits and despite the fact that the government was under no obligation to provide such benefits in the first instance.

dicial institutions, beginning with *Walz* and continuing through *Jimmy Swaggart*, as well as those addressed to intervention by legislatures, *see Kreshik v. St. Nicholas Cathedral*, 363 U.S. 190, 80 S.Ct. 1037, 4 L.Ed.2d 1140 (1960) (per curiam), that the same prophylactic rule must also apply to intervention in church affairs by non-judicial branches of civil government. In general "[iI]t is of no moment that the State" has selected a particular branch of its government to carry out the challenged conduct, "for whether legislative or judicial, it is still the application of state power which we are asked to scrutinize." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 463, 78 S.Ct. 1163, 1172, 2 L.Ed.2d 1488 (1958). The principle of abstention is equally applicable to the decisions of church authorities that are not constituted as canonical courts or judicatories but merely as administrators. *See, e.g., Gonzalez v. Roman Catholic Archbishop*, 280 U.S. 1, 15-16, 50 S.Ct. 5, 7-8, 74 L.Ed. 131 (1929). Thus, the potential for entanglement by executive officials like the city clerk, judicial officials involved in applying the ordinance's criminal provisions and legislative authorities like the commission, whether intentionally undertaken or not, is sufficiently "substantial" to invoke the abstention principles first articulated in *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 728-29, 20 L.Ed. 666, 676-77 (1872), reiterated in *Gonzalez*, and incorporated into First Amendment jurisprudence by *Kedroff*.[24]

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[24] Both *Watson* and *Gonzalez* were decided before the religion clauses had been deemed applicable to the states by virtue of their incorporation into the Fourteenth Amendment. As a case arising under the diversity jurisdiction of the federal courts prior to the ruling in *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), the decision in *Watson* was reached by reference to general principles of common law. *Gonzalez* was decided under the Court's appellate jurisdiction over the inferior courts of the Philippines and applied the same principles. In *Kedroff* the Court adopted *Watson*, as elaborated in *Gonzalez*, as federal constitutional law.

When combined with the imposition of criminal enforcement mechanisms, the regime may become doubly offensive. We need not reiterate the many important concerns that underlie the principle of separation between the functions of government and those of churches under the First Amendment. *See, e.g., Kedroff*, 344 U.S. at 116, 73 S.Ct. at 154; *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203, 212, 68 S.Ct. 461, 465, 92 L.Ed. 649 (1948); *Watson*, 80 U.S. (13 Wall.) at 728-29, 20 L.Ed. at 676-77. We simply note that the procedures for citizen complaint to the city attorney and investigation by subpoena enacted in the 1984 Ordinance underscore the already substantial risk of government participation in intramural church conflict and decisionmaking. The provisions of the 1984 Ordinance requiring prospective and retrospective disclosure of church finances, activities and organization as a condition of soliciting funds foster an excessive government entanglement.[25]

The ordinance requires organizations to make limited public disclosure even when other information is omitted

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[25] We have no need to consider the validity of other governmental regimes for disclosure of financial information by churches, such as that imposed by the Internal Revenue Service in administering 26 U.S.C. § 501(c)(3), which was evaluated against a claim of excessive entanglement by neither the Ninth Circuit in *Church of Scientology v. Commissioner* nor the Supreme Court in *Bob Jones University v. United States*, 461 U.S. 574, 604 n. 30, 103 S.Ct. 2017, 2035 n. 30, 76 L.Ed.2d 157 (1983). *See generally, e.g.*, Rev. Rul. 89-74, 1989-1 C.B. 311 (explaining I.R.S. treatment of exemptions or deductions claimed in relation to "churches" that actually constitute tax shelters). Such regimes may or may not be distinguishable from the City's in a number of respects, such as the scope or detail of required disclosure, the mechanisms for monitoring and enforcement and the confidentiality which routine filings are accorded. *See, e.g.*, 26 U.S.C. §§ 508(c)(1)(A), 6033(a)(2)(A)(i), 6042, 6049(b)(2)(C)(i), (b)(4)(B), 6050N(c), 6104, 7611; Rev.Proc. 86-23, 1986-1 C.B. 564; *cf. Hernandez*, 490 U.S. at 696-98 & n. 12, 109 S.Ct. at 2147-48 & n. 12 (holding that determination of quid pro quo nature of religious contributions in administering 26 U.S.C. § 170 threatened no excessive entanglement).

from the registration form in reliance upon the private statement option. This mandatory public disclosure includes the nature and identity of the organization, its tax-exempt status, other Florida cities in which it is registered and the criminal histories of its officers and solicitors. Code § 100.03(1)(a), (b), (c), (j). This limited disclosure requires no continuing monitoring by private or public entities, imposes only a minimal burden on the organization and does not significantly interfere in the ordering of church affairs voluntarily accepted by members. This requirement standing alone does not foster an excessive entanglement. "The internal operations of the organization . . . remain under the veil of privacy." *ISKCON-Houston*, 689 F.2d at 556. The Supreme Court has said that "a state may protect its citizens from fraudulent solicitation by requiring a stranger in the community, before permitting him publicly to solicit funds for any purpose, to establish his identity and his authority to act for the cause which he purports to represent." *Cantwell*, 310 U.S. at 306, 60 S.Ct. at 904; *see also Riley v. National Fed'n of the Blind*, 487 U.S. 781, 799 n. 11, 108 S.Ct. 2667, 2679 n. 11, 101 L.Ed.2d 669 (1988). Upon remand, if the district court finds that the ordinance as a whole was not enacted with impermissible motive, it should proceed to determine whether the severability provision may appropriately be applied to preserve such limited disclosure.

C. *Asserted City Justification*

The protections of the First Amendment are not absolute. The City argues that the excessive entanglement analysis also requires an evaluation of the objectives of the government's regulation and an assessment of whether it is adequately tailored to serve them. Scientology argues to the contrary that such an approach is inconsistent with the Supreme Court's precedents, which it contends have followed a categorical rather a comparative balancing approach in applying the *Lemon* Establishment

Clause criteria and have reserved the familiar "compelling interest" test of *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963), and its progeny[26] for application under the Free Exercise Clause. We note that the continuing vitality of the *Sherbert* test has been limited by the Court's decision in *Employment Division v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990), which held that generally applicable criminal laws need not be justified by a compelling interest to withstand attack under the Free Exercise Clause. *See also Church of the Lukumi Babalu Aye v. City of Hialeah*, —— U.S. ——, ——, 113 S.Ct. 2217, 2226, 124 L.Ed.2d 472 (1993).

The criteria adopted in *Lemon* and elaborated in its progeny are absolute in themselves, and a law that fails to meet any of them is per se invalid. Unlike the limitations placed upon government power to protect the individual's freedoms of expression and conscience under other clauses of the First Amendment, limitations which are themselves circumscribed by the flexible analysis of compelling interests, those imposed by *Lemon* provide a prophylactic wall of separation between church and state. *See Everson*, 330 U.S. at 15-16, 67 S.Ct. at 511-12; *Larkin*, 459 U.S. at 122-23, 103 S.Ct. at 510. The Supreme Court has often invalidated statutes without asking how the challenged legislation was related to a government objective. *See, e.g., Aguillard*, 482 U.S. at 585-94, 107 S.Ct. at 2578-83 (impermissible purpose); *Felton*, 473 U.S. at 408-15, 105 S.Ct. at 3236-39 (excessive entanglement); *Meek v.*

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[26] *See Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 141-42, 107 S.Ct. 1046, 1049, 94 L.Ed.2d 190 (1987); *United States v. Lee*, 455 U.S. 252, 257-58, 102 S.Ct. 1051, 1055, 71 L.Ed.2d 127 (1982); *Thomas v. Review Bd.*, 450 U.S. 707, 717-19, 101 S.Ct. 1425, 1431-33, 67 L.Ed.2d 624 (1981); *Wisconsin v. Yoder*, 406 U.S. 205, 220-21, 92 S.Ct. 1526, 1535-36, 32 L.Ed.2d 15 (1972); *Gillette v. United States*, 401 U.S. 437, 462, 91 S.Ct. 828, 842, 28 L.Ed.2d 168 (1971); *see also West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 639, 63 S.Ct. 1178, 1186, 87 L.Ed. 1628 (1943).

Pittenger, 421 U.S. 349, 367-70, 95 S.Ct. 1753, 1764-66, 44 L.Ed.2d 217 (1975) (same); *Lemon*, 403 U.S. at 618-19, 91 S.Ct. at 2114 (same). In *Larkin* the Court noted that the state's asserted interests in providing for the regulation of liquor distribution and controlling the use of property in the vicinity of schools, churches, hospitals and similar institutions readily could have been furthered by other regulation. 459 U.S. at 124-25, 103 S.Ct. at 510-11, but it did not rely upon this observation to invalidate a statute that conferred government liquor licensing powers upon churches and thereby enmeshed secular and ecclesiastical authority, 459 U.S. at 126-27, 103 S.Ct. at 511-12. Nor has the Court ever implied that it favored such an approach to the *Lemon* standards, even in decisions that simultaneously applied a compelling interest analysis under the Free Exercise Clause. *See, e.g., Hernandez*, 490 U.S. at 699-700, 109 S.Ct. at 2149; *Gillette*, 401 U.S. at 461, 91 S.Ct. at 842; *cf. Corporation of the Presiding Bishop v Amos*, 483 U.S. 327, 339, 107 S.Ct. 2862, 2870, 97 L.Ed.2d 273 (1987) (stating that judicial review of statute that "passes the *Lemon* test" requires inquiry "whether Congress has chosen a rational classification to further a legitimate end"). The statement in *Allegheny* that "strict scrutiny" should be applied to the *Lemon* "effects" prong, 492 U.S. at 608-09, 109 S.Ct. at 3109, appears to have been a misleading choice of words, for no compelling interest analysis was undertaken. The Establishment Clause prevents seemingly important justifications from becoming a shield to defend the subtle and incremental advance of government administration into the field of church activities. It is this function of the excessive entanglements analysis which helps to give meaning to the textual distinction in the First Amendment between "law[s] respecting an establishment of religion" on the one hand and "[laws] prohibiting the free exercise thereof."

Moreover, nothing in *Smith* has thrown doubt upon the categorical analytical approach embodied in *Lemon* and its progeny. The City's reliance upon *Smith*, together

with Nineteenth Century decisions upholding laws that forbade polygamy,[27] decisions applying labor and tax laws in the face of religious objections,[28] and those sustaining zoning regulations,[29] is clearly misplaced, for those decisions involved Free Exercise rather than Establishment Clause challenges. The City's invocation of *Bob Jones University v. United States*, 461 U.S. 574, 103 S.Ct. 2017, 76 L.Ed.2d 157 (1983), is unavailing for the same reason.[30]

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[27] *Davis v. Beason*, 133 U.S. 333, 10 S.Ct. 299, 33 L.Ed. 637 (1890); *Reynolds v. United States*, 98 U.S. 145, 25 L.Ed. 244 (1879). To the extent that *Davis* may have interpreted the Establishment Clause (as distinct from the Free Exercise Clause) as subordinate to state regulation of "acts recognized by the general consent of the Christian world in modern times as proper matters for prohibitory legislation," 133 U.S. at 343, 10 S.Ct. at 301, 33 L.Ed. at 640, we regard it as no longer controlling. Neither *Davis* nor *Reynolds* presented issues of Establishment Clause concern, as those concerns are understood in contemporary decisions like *Lemon*.

[28] *Prince v. Massachusetts*, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944); *United States v. Lee*, 455 U.S. 252, 257-58, 102 S.Ct. 1051, 1055, 71 L.Ed.2d 127 (1982); *United States v. Sun Myung Moon*, 718 F.2d 1210, 1227 (2d Cir.1983), *cert. denied*, 466 U.S. 971, 104 S.Ct. 2344, 80 L.Ed.2d 818 (1984).

[29] *Grosz v. City of Miami Beach*, 721 F.2d 729 (11th Cir.1983), *cert. denied*, 469 U.S. 827, 105 S.Ct. 108, 83 L.Ed.2d 52 (1984); *Lakewood Congregation of Jehovah's Witnesses v. City of Lakewood*, 699 F.2d 303, 303 & n. 1 (6th Cir.), *cert. denied*, 464 U.S. 815, 104 S.Ct. 72, 78 L.Ed.2d 85 (1983).

[30] The bulk of the constitutional analysis in *Bob Jones* addressed the government's compelling interest in preventing racial discrimination, which the Court held was served by a narrowly tailored regulation denying religious and charitable tax exemptions to discriminatory schools and colleges. This discussion applied the Free Exercise Clause. The Court also found the regulation permissible under *Lemon*'s effects criterion of Establishment Clause analysis because it was "founded on a neutral, secular basis." 461 U.S. at 604 n. 30, 103 S.Ct. at 2035 n. 30 (quoting *Gillette*, 401 U.S. at 452, 91 S.Ct. at 837). Nothing in *Bob Jones* suggests a holding that regulations which are otherwise impermissible under *Lemon* may be justified by showing their close fit to a compelling interest.

Similarly, *Village of Schaumberg v. Citizens for a Better Environment*, 444 U.S. 620, 100 S.Ct. 826, 63 L.Ed.2d 73 (1980), involved asserted violations of the plaintiffs' freedom of speech by government conduct directly addressed to such protected activity. Regulations having such an effect upon speech are also subject to strict scrutiny under the compelling interest standard. *See, e.g., Sable Communications v. FCC*, 492 U.S. 115, 126, 109 S.Ct. 2829, 2836, 106 L.Ed.2d 93 (1989); *Citizens for a Better Environment*, 444 U.S. at 637, 100 S.Ct. at 836; *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 786, 98 S.Ct. 1407, 1421, 55 L.Ed.2d 707 (1978). Regulations fostering an excessive entanglement between government and church are not.

In *Gonzalez* the Court suggested by negative implication that civil courts may supplant a decision of church authorities "[i]n the [presence] of fraud, collusion, or arbitrariness." 280 U.S. at 16-17, 50 S.Ct. at 7-8; *cf. Presbyterian Church*, 393 U.S. at 452 n 7, 89 SCt. at 607 n. 7. In *Serbian Diocese*, however, the Court cast doubt upon the continuing vitality of the *Gonzalez* dictum by holding that "whether or not there is room for 'marginal civil court review' under the narrow rubrics of 'fraud' or 'collusion' when church tribunals act in bad faith and for secular purposes, no 'arbitrariness' exception" to the rule of abstention in "matters of discipline, faith, internal organization, or ecclesiastical rule, custom or law" is permissible under the First Amendment. *Serbian Diocese*, 426 U.S. at 713, 96 S.Ct. at 2382.[31] Even if the common law reasoning of *Gonzalez* also embodies the constitutional rule governing civil review of particular church decisions, the Court has not imported a judicial inquiry concerning fraud or collusion into the general *Lemon* analysis embracing the broad range of potentially establishmentarianist laws. In *Felton, Meek* and *Lemon*, for example, the

[31] *See also Brundage v. Deardorf*, 92 F. 214, 228-30 (6th Cir. 1989).

Court did not pause to consider whether the state's interest in preventing "fraudulent" misappropriation of government funds to sectarian uses was "compelling" or otherwise substantial, or whether the means chosen were well tailored to accomplish that end, before it condemned the state's regulatory oversight of church expenditures. *Cf. Felton*, 473 U.S. at 409, 105 S.Ct. at 3236 ("At best, the supervision in this case would assist in preventing the Title I program from being used, intentionally or unwittingly, to inculcate the religious beliefs of the surrounding parochial school."). Indeed, even in applying the Free Exercise Clause itself, we have held that no flexible analysis of compelling interest justifications may be entertained when the challenger shows either that the law was actually enacted for a sectarian purpose or that "the 'essential effect' of the government action is to influence negatively the pursuit of religious activity or the expression of religious belief." *Grosz v. City of Miami Beach*, 721 F.2d 729, 733 (11th Cir. 1983), *cert. denied*, 469 U.S. 827, 105 S.Ct. 108, 83 L.Ed.2d 52 (1984).[82]

Lemon is not the only guiding light in the Establishment Clause firmament. When the Court found explicitly preferential treatment for one sect over another to be plain on the face of an ordinance, it allowed the government to show that the preference was "closely fitted" to serve a "compelling governmental interest," *Valente*, 456 U.S. at 246 & n. 23, 102 S.Ct. at 1684-85 & n. 23, and invalidated the statute only upon finding that the government had failed to carry this burden. Nevertheless, the compelling interest justification held out by *Valente* is unavailable to the City in the present case because the 1984 Ordinance is facially neutral among religions and indeed applies to wholly secular charities as well as churches. *See Hernan-*

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[82] In addition, of course, "[t]he freedom to hold religious beliefs and opinions is absolute." *Braunfeld v. Brown*, 366 U.S. 599, 603, 81 S.Ct. 1144, 1146, 6 L.Ed.2d 563 (1961).

dez, 490 U.S. at 695-96, 109 S.Ct. at 2146-47.[33] Therefore, we need not decide how *Valente*'s strict scrutiny complements *Lemon*. *See Amos*, 483 U.S. at 339, 107 S.Ct. at 2870; *Donnelly*, 465 U.S. at 696 n. 2, 104 S.Ct. at 1371 n. 2 (Brennan, J., dissenting).[34] Thus, we need go no further to conclude that the law's recordkeeping and disclosure requirements associated with the prospective and retrospective public disclosure and alternative private statements are invalid as applied to church solicitations of members and the public. The district court's orders denying summary judgment to Scientology and granting summary judgment to the City must be reversed in this respect.

D. *Free Exercise Analysis*

Some early cases appeared to proscribe civil intervention in church affairs by applying the Free Exercise Clause. *See, e.g., Kedroff*, 344 U.S. at 114, 73 S.Ct. at 153-54. The Fifth Circuit's citation of free exercise cases in *Simpson*, 494 F.2d at 493, shows that it viewed the principle as flowing from that source. As such, the prohibition against civil intervention arguably might be overcome by showing that it was necessary to serve a compelling interest, although at the time *Kedroff* was decided in 1952 the Court had not yet applied contemporary strict scrutiny standards to the Free Exercise Clause. *See Ked-*

[33] The exemption provided by Code § 100.02(1) for volunteer and small scale organizations is a denominational preference favoring such groups at the expense of larger denominations. Scientology has not challenged the exemption directly and the City has articulated no justification, compelling or otherwise, in support of this classification.

[34] Moreover, to the extent that the concerns presented in the instant case are similar to the concerns implicated in *Valente*, we believe our holding in this case—regarding which disclosures pass muster and which are too intrusive—is consistent with *Valente*. *See Valente*, 456 U.S. at 253-54 & n. 29, 102 S.Ct. at 1688 & n. 29. We believe the same can be said with respect to *Village of Schaumburg*, *supra*, and the other strict scrutiny cases relied upon by the city.

roff, 344 U.S. at 117-19, 73 S.Ct. at 155-56 (distinguishing *American Communications Ass'n v. Douds*, 339 U.S. 382, 399-400, 70 S.Ct. 674, 684-85, 94 L.Ed. 925 (1950)).[35] Nevertheless, as our discussion above shows, the Establishment Clause also is implicated when the government entangles itself on a continuing basis in the nondoctrinal affairs of church functioning.

The two clauses are closely related in their purposes. For instance, the Establishment Clause prohibition of denominational preferences "is inextricably connected with the continuing vitality of the Free Exercise Clause." *Valente*, 456 U.S. at 245, 102 S.Ct. at 1683. And the Court has observed,

> [w]hen the state becomes enmeshed with a given denomination in matters of religious significance, the freedom of religious belief of those who are not adherents of that denomination suffers, even when the governmental purpose underlying the involvement is largely secular. In addition, the freedom of even the adherents of the denomination is limited by the governmental intrusion into sacred matters.

Felton, 473 U.S. at 409-10, 105 S.Ct. at 3236 (condemning excessive entanglement). In *Serbian Diocese*, for instance, the Court referred broadly to "the First Amendment," without specifically citing either the Free Exercise or the Establishment Clause, and employed language that plainly implicated Establishment Clause concerns, 426 U.S. at 709, 710, 96 S.Ct. at 2380, 2381. In *Presbyterian Church* the Court adverted to both Free Exercise and Es-

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[35] *See NAACP v. Alabama*, 357 U.S. at 463, 78 S.Ct. at 1172; *Sweezy v. New Hampshire*, 354 U.S. 234, 265, 77 S.Ct. 1203, 1219, 1 L.Ed.2d 1311 (1957) (Frankfurter, J., concurring) ("For a citizen to be made to forego even a part of so basic a liberty as his political autonomy, the subordinating interest of the State must be compelling"). That expansion was not explicitly accomplished until *Sherbert* was decided in 1963. *Cf. Thomas v. Collins*, 323 U.S. 516, 530, 65 S.Ct. 315, 323, 89 L.Ed. 430 (1945).

tablishment Clause concerns. 393 U.S. at 449, 89 S.Ct. at 606; *see also Kedroff,* 344 U.S. at 121, 73 S.Ct. at 157 (Frankfurter, J., concurring) ("What is at stake here is the power to exercise religious authority."). In the seminal case establishing the principles of civil abstension upon which our opinion relies so heavily, the Court unmistakably identified Establishment Clause values as contributing. "The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect." *Watson,* 80 U.S. (13 Wall.) at 728, 20 L.Ed. at 676 (distinguishing American legal principles from the British jurisprudence respecting "the Established Church").

Yet the two clauses are distinct. *E.g., Gillette,* 401 U.S. at 453, 91 S.C. at 838. Although government conduct may be impermissible under both the Free Exercise and the Establishment Clauses, challenged conduct that satisfies the former may offend the latter. *E.g., Engel,* 370 U.S. at 430-31, 82 S.Ct. at 1266-67. Thus, we have concluded, the Establishment Clause may condemn certain entanglements that take the form of civil intervention in church political organization under *Lemon* even if they might otherwise have been justifiable under the strict scrutiny of the Free Exercise Clause.

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. . . . Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa.*

Allegheny, 492 U.S. at 591, 109 S.Ct. at 3100 (quoting *Everson,* 330 U.S. at 15-16, 67 S.Ct. at 511-12).

In support of the ordinance the City has pointed to its interests in the prevention of fraud in charitable solicitations, together with concerns that Scientology may con-

tinue to engage in alleged illicit surveillance, intimidation and blackmail of political adversaries, dissident members and apostates, as well as bizarre physically and psychologically coercive forms of social control over members. The prevention of these ills is legitimate. Nevertheless, even if the 1984 Ordinance's entangling provisions were capable of justification as narrowly tailored to serve important or compelling interests, the justifications offered by the City are lacking.

Neutral and generally applicable criminal laws may be applied to an individual without compelling justification even if they conflict with his religious beliefs. *See Smith*, 494 U.S. at 882-90, 110 S.Ct. at 1602-06. *But cf. Wisconsin v. Yoder*, 406 U.S. 205, 220-24, 92 S.Ct. 1526, 1535-37, 32 L.Ed.2d 15 (1972) (holding that generally applicable regulatory law requiring mandatory school attendance cannot be applied without exemption for religious objectors unless denial of exemption is necessary to serve compelling interests). But the 1984 Ordinance is not a "generally applicable" law "unconcerned with regulating" protected activity, *Smith*, 494 U.S. at 886 n. 3, 110 S.Ct. at 1604 n. 3. Rather, the law applies only to the solicitation of funds by religious and charitable organizations. As such, the statute is directed solely to activity protected by the First Amendment. Solicitation by secular charities, *e.g., National Fed'n of the Blind*, 487 U.S. at 789, 108 S.Ct. at 2673; *Secretary of State v. Joseph H. Munson Co.*, 467 U.S. 947, 967 & n. 16, 104 S.Ct. 2839, 2852-53 & n. 16, 81 L.Ed.2d 786 (1984), as well as fundraising by political advocacy groups, *e.g., Citizens for a Better Environment*, 444 U.S. at 632, 100 S.Ct. at 834, no less than solicitation by religious organizations, *e.g., Murdock v. Pennsylvania*, 319 U.S. 105, 108-12, 63 S.Ct. 870, 872-74, 87 L.Ed. 1292 (1943), are protected as aspects of First Amendment speech and associational freedoms. The ordinance thus has no application to conduct whose exercise is not regarded as a fundamental constitutional liberty and the rule of *Smith*

therefore does not apply.[36] In lieu thereof, we employ "exacting First Amendment scrutiny." *National Fed'n of the Blind*, 487 U.S. at 789, 108 S.Ct. at 2673.

The Supreme Court has never expressly decided whether the state's interest in preventing church-sponsored fraud upon members or the public should be considered "compelling," although in *National Federation of the Blind* the Court concluded that the state's interest in protecting secular charities and the public from fraudulently excessive fundraisers' fees was "a sufficiently substantial interest to justify a narrowly tailored regulation." 487 U.S. at 792, 108 S.Ct. at 2675. Faced with the state's asserted interest in "protecting its citizens from abusive practices in the solicitation of funds for charity," including religious causes, the Court in *Valente* "assume[d], *arguendo*, that the Act generally is addressed to a sufficiently 'compelling' governmental interest," 456 U.S. at 248, 102 S.Ct. at 1685, but proceeded to hold that the regulation at issue was not "closely fitted" to serve that interest. *See also Citizens for a Better Environment*, 444 U.S. at 636, 100 S.Ct. at 836 (same).

We conclude that the state does indeed have a compelling interest in protecting church members from affirm-

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[36] We therefore need not consider whether the lenient review envisioned by *Smith* embodies the appropriate standard for assessing criminal laws that merely enforce *malum prohibitum* regulatory provisions like these, or whether *Smith* is limited to *malum in se* offenses like the drug crimes there at issue. In other words, we do not decide whether the government may evade strict scrutiny of particular regulatory statutes merely by employing more severe criminal sanctions. *See Yoder*, 406 U.S. at 220-22, 92 S.Ct. at 1535-36 (applying strict scrutiny to mandatory schooling law); *cf. Smith*, 494 U.S. at 884, 110 S.Ct. at 1603 ("Whether or not the [Court's precedents requiring strict scrutiny] are . . . limited [to unemployment benefit decisions], they at least have nothing to do with an across-the-board criminal prohibition on a particular form of conduct."). *But cf. Montgomery v. County of Clinton*, 743 F.Supp. 1253, 1259 & n. 5 (W.D.Mich. 1990) (applying *Smith* as if it had overruled *Yoder*), *aff'd without opinion*, 940 F.2d 661 (6th Cir.1991).

ative, material misrepresentations designed to part them from their money. "Nothing we have said is intended even remotely to imply that, under the cloak of religion, persons may, with impunity, commit frauds upon the public. Certainly, penal laws are available to punish such conduct." *Cantwell*, 310 U.S. at 306, 60 S.Ct. at 904. The same interests are not diminished by the fact that victims may be voluntary members of a religious association. *See, e.g., Wright v. Downs*, 972 F.2d 350 (6th Cir.1992) (per curiam) (unpublished) (imposing securities fraud liability upon pastor who touted fraudulent mortgage notes from the pulpit), *aff'g Guthrie v. Downs*, [1992 Transfer Binder] Fed.Sec.L.Rep. (CCH) ¶ 96,896, 1991 WL 354939 (E.D.Mich. Aug. 7, 1991); *United States v. Rasheed*, 663 F.2d 843, 847-48 (9th Cir.1981) (affirming mail fraud convictions for church-sponsored Ponzi scheme), *cert. denied*, 454 U.S. 1157, 102 S.Ct. 1031, 71 L.Ed.2d 315 (1982). This is so whether the ill-gotten funds are used for a "legitimate" religious purpose (however that might be defined by civil authorities), for the personal benefit of church leaders or for some other ends.

When no affirmative misrepresentations are made concerning the uses for which funds will be employed, either explicitly or by clear implication, the state has no compelling interest in requiring members or the public to be made aware of such matters. If Scientologists are willing to contribute money without being told how it will be used, then the City has no interest in forcing the church to make such information available. "All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it." *Watson*, 80 U.S. (13 Wall.) at 728, 20 L.Ed. at 676. The continuing vitality of this principle is demonstrated by the 1989 decision in *March Fong Eu*, in which the Court held that "a State cannot substitute its judgment for that of [a political] party as to the desirability of a particular internal party structure, any more than it can tell a party

that its proposed communication to party members is unwise." 489 U.S. at 233, 109 S.Ct. at 1025 (citation omitted).[37] Therefore, the City may not substitute its own judgment as to the desirable level of disclosure to church members.

The City's argument that devout church members may refrain from availing themselves of information that the ordinance requires to be disclosed is specious, for it fails to address the concerns of adherents whose interests in maintaining the privacy of church finances are impaired by disclosure to the public or to dissident members. The City may not intervene on behalf of such dissidents. If they remain dissatisfied with the church's voluntarily assumed disclosure policy then they may attempt to reform that policy from within, they may acquiesce in the policy despite their objections or they may leave the church. Civil authority "cannot penetrate the veil of the church for the forbidden purpose of vindicating the alleged wrongs of . . . members; when they became members they did so upon the condition of continuing or not as they and their churches might determine, and they thereby submit to the ecclesiastical power and cannot now invoke the supervisory power of the civil tribunals." *Watson*, 80 U.S. (13 Wall.) at 731, 20 L.Ed. at 677 (quotations omitted).

Similarly, the Court has held that "the State's interest in unilaterally imposing its notions of fairness in the [charitable] fundraising contract is . . . constitutionally invalid." *National Fed'n of the Blind*, 487 U.S. at 792, 108 S.Ct. at 2675. For this reason, as the district court recognized, the state may not compel specific disclosures merely because, in its view, some potential contributors to some causes might tend to think that those facts evidence unfairness or some other objectionable quality in

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[37] Associational interests protected by the religion clauses stand on equal footing with protected political rights. *NAACP v. Alabama*, 357 U.S. at 460-61, 78 S.Ct. at 1171.

the use to which funds will be put. 756 F.Supp. at 1515-16 (citing *Indiana Voluntary Firemen's Ass'n v. Pearson*, 700 F.Supp. 421, 442 (S.D.Ind.1988)). Just as a church-goer may refrain from tithing if he or she is unsatisfied with the degree of disclosure, a non-member may also demand any information desired, and "if the solicitor refuses to give the requested information, the potential donor may (and probably would) refuse to donate." *National Fed'n of the Blind*, 487 U.S. at 799, 108 S.Ct. at 2679. Although substantial, the City's interest in preventing affirmative misrepresentations is not precisely furthered by the broad disclosures compelled by the 1984 Ordinance.

The City could not defend the ordinance by contending that the tenets of Scientology are fantastic or false and by arguing as a consequence that its collection of funds under the cloak of religion is therefore fraudulent. The First Amendment precludes civil authorities from evaluating the truth or falsity of religious beliefs. *United States v. Ballard*, 322 U.S. 78, 85-88, 64 S.Ct. 882, 886-87, 88 L.Ed. 1148 (1944). Thus, the fact that Scientology's doctrine of "exchange" may appear to non-adherents as a crass rationalization to justify the enrichment of a few select leaders at the expense of neophytes provides no basis for imposing burdensome and entangling regulations for the "benefit" of church members who voluntarily choose to adhere to that doctrine. Nor, for that matter, could such an official perception of theological unsoundness justify regulation respecting church disclosure to non-members.

The City's brief does refer to certain evidence in the legislative record suggesting that Scientology's now-deceased founder L. Ron Hubbard and others may have been insincere in professing church doctrines. (Appellees' Br. at 5-12). Although the City does not rely upon the principle directly, the Supreme Court has long held that civil tribunals may adjudicate the sincerity with which a

religious belief is held by an individual. *See, e.g., United States v. Seeger,* 380 U.S. 163, 185, 85 S.Ct. 850, 863, 13 L.Ed.2d 733 (1965). We need not consider how a determination concerning the sincerity of an organization's religious beliefs might appropriately be made in support of a specific administrative adjudication consistent with the procedural requirements of due process. To the extent that such a determination as to a single church is the sole support for legislation having general applicability and effect, however, the law must be fatally imprecise. Even assuming that the commission properly relied upon a conclusion that Scientology's beliefs were insincere, a contention only implicitly advanced by the City in this appeal,[38] the imposition of recordkeeping and disclosure requirements upon all churches and charities engaged in public and private solicitation would burden a great deal of protected expression without serving any legitimate purpose. The law would not be narrowly tailored, for a blanket application of regulation cannot distinguish between "fraudulent" and sincere religions. *Joseph H. Munson Co.,* 467 U.S. at 964-68, 104 S.Ct. at 2851-53; *City Council v. Taxpayers for Vincent,* 466 U.S. 789, 798 & n. 14, 104 S.Ct. 2118, 2125 & n. 14, 80 L.Ed.2d 772 (1984). Moreover, any City interest in the administrative convenience of dispensing with an individualized determination concerning the sincerity of particular religious beliefs is not compelling. *Memorial Hosp. v. Maricopa County,* 415 U.S. 250, 267-69, 94 S.Ct. 1076, 1086-88, 39 L.Ed.2d 306 (1974) (concluding that interest in convenient prevention of fraud did not justify denying health care benefits to all out-of-state immigrants in first year of residency).[39] In addition, whatever evidence might ap-

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[38] The City has conceded "for purposes of the summary judgment motion" that "Scientology's *beliefs,* as opposed to its actions, are religious in character." (Appellees' Br. at 15).

[39] *See also Kraft Gen. Foods, Inc. v. Iowa Dep't of Revenue & Fin.,* —— U.S. ——, ——, 112 S.Ct. 2365, 2371-72, 120 L.Ed.2d

propriately be considered at such a hearing, religious adherents have never been required to show the sincerity with which their deceased prophets espoused religious revelations per se; only the sincerity of contemporary church leadership might properly be put in issue.[40]

Only a few provisions of the 1984 Ordinance appear narrowly tailored to serve the City's compelling interest in preventing affirmative fraud. For example, Code § 100.05(1)(c) prohibits the "use of any scheme or artifice to defraud or obtain money or property by means of any false statement or representation." [41] Consistent with the dicta of *Cantwell*, 310 U.S. at 306, 60 S.Ct. at 904, and *National Federation of the Blind*, 487 U.S. at 799 n.11, 108 S.Ct. at 2679 n. 11, we hold that the identifying disclosure requirements of Code § 100.03(1)(a), (b), (c) and (j) are narrowly tailored to prevent fraud by religious and charitable organizations. We therefore must reject Scientology's claim that the ordinance, as we have circumscribed it, impermissibly imposes discriminatory

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59 (1992) (holding that avoiding "marginal loss in convenience" does not constitute a "compelling justification" for discrimination against foreign commerce); *Estelle v. Williams*, 425 U.S. 501, 505, 96 S.Ct. 1691, 1693, 48 L.Ed.2d 126 (1976) (finding that convenience to jail administrators is no "essential state policy" imposing a "substantial need" sufficient to justify requiring the wearing of jail clothing at criminal trials); *Stanley v. Illinois*, 405 U.S. 645, 653-58, 92 S.Ct. 1208, 1213-16, 31 L.Ed.2d 551 (1972); *Bell v. Burson*, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971); *Carrington v. Rash*, 380 U.S. 89, 85 S.Ct. 775, 13 L.Ed.2d 675 (1965).

[40] We express no opinion concerning whether a finding of insincere belief would validate the regulation imposed by this ordinance, nor do we decide its validity as applied to non-religious voluntary associations engaged in protected speech activities. The Supreme Court has noted that a regulatory scheme requiring such inquires into the beliefs of an entire religion may itself pose a risk of excessive government entanglement. *E.g., Bob Jones*, 461 U.S. at 604 n. 30, 103 S.Ct. at 2035 n. 30.

[41] The validity of this provision is not before us.

regulation of speech on the basis of the speaker's identity as a religion or charity. *See Cox v. New Hampshire,* 312 U.S. 569, 576, 61 S.Ct. 762, 766, 85 L.Ed. 1049 (1941).[42]

Despite many volumes of testimony and exhibits, however, there is simply nothing in the record to suggest that any more extensive regulation is necessary to control fraudulent conduct by charitable organizations than is available to sanction similar activities by other entities. *See, e.g., United States v. Rasheed,* 663 F.2d at 847-48 (affirming fraud convictions); Fla.Stat.Ann. §§ 812.012-812.021 (larceny, including fraud and false pretenses) (West 1993). One witness at the legislative hearings did testify that she would have abstained from membership in Scientology if more complete financial disclosure had been made available. [*See* R5-108-Exh. 1-Vol. IV-71-73; *see also id.* at 345, 412-13.] To be sure, even when a speaker's express statements are truthful in the literal sense, wilful omissions which render those statements materially misleading half-truths may constitute fraud just as surely

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[42] We recognize the tension between cases addressing regulation of charitable and religious solicitation like *Cantwell* and *National Federation of the Blind,* on the one hand, and cases addressing more broadly applicable regulation of speech like *Talley v. California,* 362 U.S. 60, 63-64, 80 S.Ct. 536, 538, 4 L.Ed.2d 559 (1960), in which the Court has held that a speaker may not be forced to identify himself as a condition of obtaining a license to sell or distribute books, handbills and the like even for the purpose of preventing fraud. *Cf. Thornburgh v. American College of Obstetricians & Gynecologists,* 476 U.S. 747, 767, 106 S.Ct. 2169, 2182, 90 L.Ed.2d 779 (1986) ("the Court consistently has refused to allow government to chill the exercise of constitutional rights by requiring disclosure of protected, but sometimes unpopular, activities"); *Hynes v. Mayor & Council of Borough of Oradell,* 425 U.S. 610, 624-30 & n. 2, 96 S.Ct. 1755, 1763-65 & n. 2, 48 L.Ed.2d 243 (1976) (Brennan, J., concurring) (finding "substantial questions whether identification requirements" for charitable solicitation were "so adequately related to their purpose as to withstand First Amendment challenge"). We do not attempt to reconcile the two lines of cases.

as overt falsehoods.[43] Even if we construed this and other testimony as evidence that Scientology's finances and operations were implicitly or explicitly misrepresented to members and contributors, however, we would not regard this conclusion as sufficient to justify the far-reaching regulation advanced by the City. In light of the potent but significantly less intrusive regulatory alternatives available to authorities for dealing with such fraud, the ordinance cannot be characterized as narrowly tailored. Nor has the City tried to explain why less restrictive alternatives like generally applicable penal laws that proscribe extortion, burglary, kidnapping and the like are inadequate to address its other asserted interests in controlling the alleged illegal and coercive conduct of charitable and religious organizations like Scientology. *See, e.g., Sun Myung Moon,* 718 F.2d at 1227 (Affirming religious leaders' convictions for filing false tax returns, obstructing justice, perjury and making false statements and submitting false documents to government agencies);[44] *United States v. Heldt,* 668 F.2d 1238, 1241 n. 2, 1242, 1244 (D.C.Cir. 1981) (per curiam) (affirming Scientologists' convictions

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[43] *See, e.g., Virginia Bankshares, Inc. v. Sandberg,* —— U.S. ——, —— & n. 7, 111 S.Ct. 2749, 2761 & n. 7, 115 L.Ed.2d 929 (1991); *United States v. Sampson,* 371 U.S. 75, 77 & n. 3, 83 S.Ct. 173, 174 & n. 3, 9 L.Ed.2d 136 (1962); *United States v. Romano,* 736 F.2d 1432, 1439 (11th Cir. 1984), *vacated in other respects as moot,* 755 F.2d 1401 (11th Cir. 1985) (per curiam); *United States v. Martino,* 648 F.2d 367, 393 (5th Cir. June 1981), *vacated in other respects as moot sub nom. United States v. Holt,* 650 F.2d 651 (5th Cir. July 1981) (per curiam), *and aff'd on other grounds sub nom. Russello v. United States,* 464 U.S. 16, 104 S.Ct. 296, 78 L.Ed.2d 17 (1983); *Adams v. G.D. Searle & Co.,* 576 So.2d 728, 730 (Fla.Dist.Ct.App.), *review denied,* 589 So.2d 290 (Fla. 1991); *Whigham v. Muehl,* 500 So.2d 1374, 1379-81 (Fla. Dist.Ct.App. 1987).

[44] We respectfully express no approval of *Sun Myung Moon* to the extent that the Second Circuit's opinion could be read to authorize a jury to displace a church's sincere determination of appropriate religious purposes under the terms of a charitable trust, 718 F.2d at 1225-27. *See Serbian Diocese,* 426 U.S. at 713, 96 S.Ct. at 2382.

for theft of government property and conspiracy to steal government property, to intercept oral communications, to forge United States government credentials, to burglarize offices of the Internal Revenue Service, the Department of Justice and a United States Attorney, to obstruct justice, to obstruct a criminal investigation, to harbor and conceal a fugitive and to make false declarations to a federal grand jury), *cert. denied*, 456 U.S. 926, 102 S.Ct. 1971, 72 L.Ed.2d 440 (1982); Fla.Stat.Ann. §§ 812.021(1)(e), 836.05 (extortion and obtaining property thereby), 810.011-810.115 (burglary and trespass), 787.01-787.02 (kidnapping and false imprisonment) (West 1993).[45] Thus, we conclude that the City has not carried its burden of showing that the required financial, operational and organizational disclosures are narrowly tailored to serve compelling interests. Those provisions are therefore void even under the strict scrutiny of the Free Exercise Clause.

IX. PRIOR RESTRAINT

Scientology contends that the city clerk's discretion in administering the prospective disclosure requirements for obtaining a registration certificate is overly broad and therefore constitutes an impermissible prior restraint of religion. The City contends that the ordinance's provision allowing continued solicitation pending judicial review through an action for declaratory judgment, Code § 100.-03(3), makes the clerk's denial of a registration statement an insignificant act.

A system of licensing speech or religious activity may be upheld against First Amendment challenge only if the

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[45] *Cf. Church of Scientology v. Armstrong*, 232 Cal.App.3d 1060, 283 Cal.Rptr. 917, 925 (1991) (disaffiliated church worker's reasonable fear of physical harm to himself and his family justified his taking of church records and rebutted Scientology's tort claims of conversion and invasion of privacy), *review denied*, (Cal. Oct. 17, 1991).

criteria for denying a license are narrowly tailored to serve compelling governmental interests. *See, e.g., Joseph H. Munson Co.*, 467 U.S. at 967-68 & n. 13, 104 S.Ct. at 2852-53 & n. 13; *Fernandes v. Limmer*, 663 F.2d at 628. Closely related to this requirement, although distinct, is the rule that "[s]uch a scheme may not delegate overly broad licensing discretion to a government official." *Forsyth County v. Nationalist Movement*, —— U.S. ——, ——, 112 S.Ct. 2395, 2401, 120 L.Ed.2d 101 (1992); *see also, e.g., Saia v. New York*, 334 U.S 558, 68 S.Ct. 1148, 92 L.Ed. 1574 (1948).

The requirement of definite and precise standards to guide regulations of speech is distinct from the procedural requirements imposed by *Freedman v. Maryland*, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965), and its progeny.[46] *See, e.g., City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 771, 108 S.Ct. 2138, 2151-52, 100 L.Ed.2d 771 (1988). For whether speech is prohibited before the exercise of judicial review functions or after, the effect of such a ban is to impose a prior restraint. Moreover, a vague law is not rendered more precise by virtue of a court having passed upon its application to particular facts. Rather, such a process merely shifts the exercise of impermissibly broad discretion from execu-

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[46] A system of prior restraint must guarantee prompt and final judicial review of an executive determination to deny a license, so that an erroneous abridgment of freedom of speech may be corrected as quickly as reasonably possible in the adversarial setting of a courtroom. *E.g., National Fed'n of the Blind*, 487 U.S. at 802, 108 S.Ct. at 2680-81. In most circumstances, the scheme must place upon the government the burden of initiating such proceedings and demonstrating the propriety of the restraint. *See FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 225-27, 110 S.Ct. 596, 604-07, 107 L.Ed.2d 603 (1990) (three-Justice opinion of O'Connor, J.); *id.*, 493 U.S. at 238-42, 110 S.Ct. at 611-13 (three-Justice opinion of Brennan, J.). Scientology has not challenged the procedural safeguards adopted in the 1984 Ordinance, and we therefore express no opinion concerning them.

tive officials to judges, a shift that has no significance in First Amendment jurisprudence. *Baggett v. Bullitt*, 377 U.S. 360, 373, 84 S.Ct. 1316, 1323, 12 L.Ed.2d 377 (1964) ("judicial safeguards do not neutralize the vice of a vague law" under the First Amendment); *see also, e.g., Maynard v. Cartwright*, 486 U.S. 356, 364, 108 S.Ct. 1853, 1859, 100 L.Ed.2d 372 (1988) (holding that judicial finding of factual basis for death sentence did not cure vagueness in criteria for penalty determination); *cf. Vance v. Universal Amusement Co.*, 445 U.S. 308, 317, 100 S.Ct. 1156, 1162, 63 L.Ed.2d 413 (1980) (per curiam) (requiring procedural safeguards for judicial injunctions of speech). Indeed, we note that declaratory judgment under Fla.Stat.Ann. § 86.011 (West 1993) is itself a discretionary remedy, and the circuit court's decision to grant or deny review is accorded great deference. *E.g., Travelers Ins. Co. v. Emery*, 579 So.2d 798, 800-01 (Fla.Dist.Ct.App.1991).

Nevertheless, the limited prospective disclosure requirements of identifying information under Code § 100.03(1)(a), (b), (c) and (j), which we have held to be otherwise permissible against the religion clause challenges raised by Scientology, are not void for vagueness. It is a purely ministerial function to determine whether a registration form provides a statement of the nature and identity of the organization, its tax-exempt status, other Florida cities in which it is registered and the criminal histories of its officers and solicitors. The ordinance on its face provides the clerk with no authority to make an investigation of the truthfulness of these statements or an evaluation of their completeness, and Scientology has not pointed to evidence that responsible administrative officials have inferred such authority. Nor may the clerk pass judgment upon the truthfulness or persuasiveness of any proffered explanation under Code § 100.03(1)(n) why such information is not available to be disclosed. Thus, the clerk has no latitude to engage in invidious discrimination agains disfavored speakers or religions. *Cf., e.g., Cox v.*

Louisiana, 379 U.S. 536, 557-58, 85 S.Ct. 453, 466, 13 L.Ed.2d 471 (1965). In this respect the district court's order upholding the ordinance is affirmed.[47]

X. REFUND POLICY REGULATIONS

As part of its doctrine of "exchange," Scientology collects payments from adherents whenever they receive religious services or training. As a corollary to that doctrine, the organization has a practice of offering to refund the payments to anyone who is not satisfied with the spiritual benefits he or she derives from such services. Scientology challenges the provision of the 1984 Ordinance requiring that it provide a written statement of any refund policy "at the time such representation is made," Code § 100.05(1)(g). It also objects to the provision mandating that money be returned within sixty days of request, Code § 100.05(1)(f). Willful violations of these provisions are criminal offenses. Code § 100.05(2).

The district court recognized, and the parties agree, that the City may not require an organization to adopt a refund policy in the first instance. 756 F.Supp. at 1523. Scientology contends that the ordinance "both mandates the manner in which a church policy is communicated to a church member . . ., and engrafts an additional condition upon the church policy, *i.e.*, a time limit in which to make the refund." (Appellant's Br. at 24). The City contends that it has a compelling interest in preventing fraudulent offers of refunds that justifies the provisions.

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[47] We express no opinion concerning the degree of discretion afforded the clerk to review disclosures that we have held cannot be required in any event. To the extent that the district court's order addressed these provisions it is vacated as moot. Scientology has not argued that the circuit court's authority to excuse disclosure on grounds of "special or unique hardship to the charitable organization," Code § 100.03(4), embodies impermissible discretion and we therefore express no opinion as to that provision.

A. *Standard of Judicial Review*

Under the Free Exercise Clause we apply strict scrutiny to legislation that imposes a substantial burden on the observation of a religious belief or practice. *Hernandez,* 490 U.S. at 699, 109 S.Ct. at 2148. (As already noted, the more lenient standard of *Smith* is inapplicable to the 1984 Ordinance). Solicitation of funds by religious organizations is protected religious expressive activity under the First Amendment. *See Murdock,* 319 U.S. at 108-12, 63 S.Ct. at 872-74; *Cantwell,* 310 U.S. at 3^3-05, 60 S.Ct. at 903-04. There can be no contention that the practice of "exchange" in the solicitation of funds in connection with religious services and training is anything other than central to Scientology's religious practice, because "[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds," *Hernandez,* 490 U.S. at 699, 109 S.Ct. at 2149.[48]

B. *Discussion*

We have held above that the City has a compelling interest in preventing affirmatively fraudulent conduct but no interest in regulating religious conduct as such. The legislative history contains substantial evidence that the refund policy had not been followed as promised, with the consequence that many contributors were deprived of their money by their reliance on statements appearing to be incomplete or only half-true. For instance, it appears that most contributors were not informed of the substantial

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[48] We therefore need not consider the Fifth Circuit's conclusion in *ISKCON-Houston* that "conduct relating to the solicitation of funds from the public [is] primarily a secular function." 689 F.2d at 556. Nor must we address the significance of this conclusion in considering the impact of solicitation regulation upon freedoms protected by other aspects of the First Amendment. *Cf. National Fed'n of the Blind,* 487 U.S. at 789, 108 S.Ct. at 2673; *Citizens for a Better Environment,* 444 U.S. at 632, 100 S.Ct. at 834.

procedural obstacles placed before applicants seeking refunds from Scientology, [*see* R5-108-Exh. 1-Vol. II-205-06,] and some contributors who had previously signed prospective waiver forms may have been led to the erroneous belief that their refund rights would be unaffected, [*see id.* Vol. III-79-81.] As we have already pointed out, wilful omission of such material facts constitutes fraud. The clear scope of Code § 100.05(1)(g)'s requirement that solicitors provide "a written statement of the terms and conditions upon which refunds are made" at the time when a refund promise is given encompasses the very sort of deception revealed at the hearings. We agree with the commission's apparent conclusion that requiring a complete and contemporaneous written statement will help substantially in preventing subtle and overt misrepresentations about the substance of a refund policy.

To the extent that the ordinance requires the statement to be contemporaneous with the offer of a refund, it merely duplicates the generally applicable principle that one may not wilfully and fraudulently omit material facts in the course of attempting to secure money from others. The requirement that the statement be given in writing goes beyond otherwise applicable law, but is narrowly tailored to meet the specific problems presented by the sophisticated practices of coercion, deception and psychological manipulation of groups like Scientology. This particular provision does not, by itself, require civil authorities to attempt to interpret or apply a church policy, an undertaking that is forbidden under both religion clauses by *Serbian Diocese*, 426 U.S. at 713, 96 S.Ct. at 2382.[49] Moreover, we can think of no significantly less rsetrictive alternative proposal for combatting this established evil, particularly in view of the fact that the restriction on religious practice is sharply reduced by the limited role that civil authorities may play in enforcing

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[49] The requirement of a written statement thus fosters no excessive entanglement under the Establishment Clause.

such a policy.[50] The provision is closely fitted to serve its evident purposes, and the need for regulation is supported by actual evidence. This limited and precise disclosure provision, based on empirical evidence of actual abuses, is valid under the First Amendment. *Cf. Peel v. Attorney Registration & Disciplinary Comm'n,* 496 U.S. 91, 106-11, 110 S.Ct. 2281, 2290-93, 110 L.Ed.2d 83 (1990) (plurality opinion); *id.*, 496 U.S. at 112-1, 110 S.Ct. at 2294-95 (Marshall, J., concurring) (analyzing reasonable regulation of commercial speech). The district court's order granting summary judgment to the City and denying summary judgment to Scientology is affirmed in this respect.

The City concedes that it may not require a church to adopt a refund policy or dictate the terms of a policy voluntarily adopted. Yet Code § 100.01(5)(g) would require a policy of refunding money within sixty days of request whenever a refund policy is adopted, a course of conduct at odds with Scientology's current policy of submitting refund requests to a church authority that determines the bona fides of the request and counsels the member who is dissatisfied with the spiritual benefits he has received. [R5-110-Tab 1-2-3.] The statute has the principal effect of mandating a church policy, an effect on the free exercise of religion which is sufficiently direct to implicate our strict scrutiny. In this respect it differs from the incidental financial burden upon free exercise imposed by generally applicable, neutrally applied taxation laws like the sales tax upheld in *Jimmy Swaggart,* and the non-deductibility and exemption provisions construed in *Hernandez* and *Bob Jones.* In addition, we also note that the mandated policy would be especially burdensome in cases where a refund is requested many years after the contribution is given,[51] for by imposing potentially

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[50] We have no occasion in this appeal to consider the circumstances in which the terms of such a policy might appropriately be construed or applied by a civil court.

[51] The 1984 amendment eliminated a clause restricting the mandatory sixty day refund to cases in which the request is made within a "reasonable" time.

limitless contingent liabilities the provision would significantly undermine the security of a church's finances.[52]

The sixty-day refund is not narrowly tailored to serve the City's compelling interests. Although we agree that the provision conceivably might help to deter or remedy fraud, those interests are far better served by the less restrictive alternatives of requiring written disclosure of whatever policy the church adopts and enforcing generally applicable anti-fraud laws to the extent permitted by the First Amendment. *Cf., e.g., Ballard*, 322 U.S. at 85-88, 64 S.Ct. at 886-87; *Dovydenas v. The Bible Speaks (In re The Bible Speaks)*, 869 F.2d 628, 643-44, 645-46 (1st Cir.), *cert. denied*, 493 U.S. 816, 110 S.Ct. 67, 107 L.Ed.2d 34 (1989); *Founding Church of Scientology*, 409 F.2d at 1161, 1163-64; *Van Schaick v. Church of Scientology*, 535 F.Supp. 1125, 1140, 1141 (D.Mass. 1982).[53] At best the provision affords only marginal additional benefits beyond those already conferred by other regulation. *See City of Cincinnati v. Discovery Network*, —— U.S. ——, ——, 113 S.Ct. 1505, 1515, 123 L.Ed.2d 99 (1993) (commercial speech case). Instead, the provision advances the City's illegitimate goal of dictating to churches what the policy shall be, simultaneously imposing its own enforcement mechanisms in support of the mandated policy. The provision is void under the Free Exercise Clause,[54] and the district court's order granting the City's motion for summary judgment and denying Scientology's motion for summary judgment is reversed in this respect.

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[52] Unlike the district court, 756 F.Supp. at 1522-23, we do not believe that the non-deductibility of such contributions under the Internal Revenue Code following *Hernandez* is at all material.

[53] Not coincidentally, the plaintiff in *Van Schaick* was also a client of Flynn's and a witness at the televised hearings.

[54] We therefore need not consider the Establishment Clause implications of the provision.

XI. CONCLUSION

With the exception of the limited prospective disclosure of identifying information, the provisions of the 1984 Ordinance requiring prospective and retrospective disclosure and recordkeeping concerning solicitations directed toward members and the public foster an excessive entanglement between government and religion in violation of the Establishment Clause, substantially interfere in church organization without compelling justification in violation of the Free Exercise Clause, and are therefore void as applied to churches. The requirement of the otherwise valid disclosure in the registration form, however, does not impermissibly restrain free speech and religion by conferring undue discretionary power to deny a certificate. The district court's order upholding these provisions against the claim of vagueness is affirmed, although its order is vacated with respect to the invalid disclosure requirements.

The mandatory sixty-day refund provision is an impermissible intrusion on Scientology's free exercise of religion and is void as applied to churches. The requirement of providing a written statement of a refund policy, however, is otherwise valid. Upon remand, the district court should determine, consistent with this opinion, whether the 1984 Ordinance was enacted with impermissible sectarian motives. If the district court finds a predominantly or pre-eminently sectarian motive then it should permanently enjoin the City from enforcing the ordinance. If the district court finds no such motive then it should consider which of the otherwise valid provisions, if any, may appropriately be preserved by the ordinance's severability clause.

AFFIRMED in part, VACATED in part, REVERSED in part, and REMANDED.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No. 4-719-CIV-T-17

CHURCH OF SCIENTOLOGY FLAG SERVICES ORG., INC.,
Plaintiff,

vs.

CITY OF CLEARWATER, *et al.*,
Defendants.

ORDER ON MOTIONS

[Filed Feb. 4, 1990]

This cause is before the Court on the Following:

Dkt. 80 Motion for partial summary judgment on the issue of standing by Plaintiff and request for oral argument on this motion by Plaintiff, filed July 23, 1987.

Dkt. 81 Memorandum of law in support of motion for partial summary judgment by Plaintiff, filed July 23, 1987.

Dkt. 82, 83, 84 Affidavits of Professor Lonnie D. Kliever, Frank K. Flinn, and Reverend James Sydejko, filed July 23, 1987.

Dkt. 105 Motion for partial summary judgment by Plaintiff, filed January 15, 1988.

Dkt. 106 Motion for summary judgment by Defendants Clearwater, Goudeau, and Galbraith, filed January 15, 1988.

Dkt. 108 Memorandum of law in support of Defendants' motion for summary judgment with exhibits, filed January 15, 1988.

Dkt. 109 Memorandum of law in support of motion for partial summary judgment by Plaintiff, filed January 15, 1988.

Dkt. 110 Affidavits/exhibits in support of Plaintiff's motion for partial summary judgment, filed January 15, 1988.

Dkt. 111 Request for oral argument on the issues of motion for summary judgment by Defendants, filed February 16, 1988.

Dkt. 112 Memorandum of law in opposition to Plaintiff's motion for summary judgment with exhibits 1-4 attached yet filed under separate cover by Defendants, filed February 16, 1988.

Dkt. 113 Memorandum of law in opposition to Defendants' motion for summary judgment with Exhibit A attached by Plaintiff, filed February 16, 1988.

Dkt. 116 Reply memorandum in support of its motion for partial summary judgment by Plaintiff, filed March 15, 1988.

Dkt. 117 Reply memorandum to Plaintiff's memorandum in opposition to Defendants' motion for summary judgment by Defendants. (Exhibit, Deposition Excerpts and Case Authorities attached), filed March 16, 1988.

Dkt. 129 Notice of filing documents in support of motion for summary judgment and in opposition to Plaintiff's motion for summary judgment by Defendants (Documents filed under separate cover), filed January 20, 1989.

Dkt. 133 Supplemental memorandum of points and authorities in support of motion for partial summary judgment and in opposition to motion for summary judgment by Plaintiff, filed July 11, 1989.

Dkt. 137 Motion to strike memorandum of points and authorities in support of motion for partial summary judgment and in opposition to motion for summary judgment by Defendants, filed July 26, 1989.

Dkt. 139 Memorandum in response to Defendants' motion to strike Plaintiff's supplemental memorandum and request to permit the filing and consideration of supplemental authorities by Plaintiff, filed August 18, 1989.

Dkt. 143 Motion to strike letter of July 16, 1990 and memorandum in support by Plaintiff, filed August 9, 1990.

Dkt. 144 Response to Plaintiff's motion to strike and Defendants' motion for leave to file notice of supplemental authorities and memorandum in support by Defendants, filed August 22, 1990.

The cross motions for summary judgment require this Court to determine whether Church of Scientology Flag Service Organization, Inc. has standing to sue in this matter and whether Clearwater Ordinance 3479-84 regulating charitable contributions is constitutional.

The Court finds that Scientology has standing and that all provisions of Clearwater Ordinance 3479-84 are constitutional. Therefore, the Court grants Scientology's motion for partial summary judgment on the issue of standing, but denies summary judgment on all other issues. The Court denies Defendant Clearwater's motion for summary judgment on the issue of standing, but grants summary judgment on all other issues. The Court's reasoning is set out below.

BACKGROUND

Defendant City of Clearwater (Clearwater) is a municipality of the State of Florida. In 1975, Plaintiff Church of Scientology Flag Services Organization, Inc. (Scientology) established a major base in Clearwater. Scientology rests almost entirely upon the writing L. Ron Hubbard. *Founding Church of Scientology of Washington, D.C. v. United States*, 409 F.2d 1146, 1153 (D.C. Cir.), *cert. denied* 396 U.S. 963 (1969). In the early 1950's Hubbard wrote tracts elucidating what he called Dianetics. Dianetics is a theory of therapeutic mind techniques, based on the idea that man possesses both a reactive mind and an analytic mind. The analytic mind is comparable to a superior computer, incapable of error and human misjudgments that create social problems and individual suffering. The reactive mind is made up of patterns imprinted on the nervous system in moments of pain, stress or unconsciousness. These patterns are called engrams. Engrams are triggered by stimuli associated with the original imprinting, and produce unconscious or conditioned behavior that is harmful or irrational. The reactive mind makes the errors and misjudgments that create social problems and individual suffering. *Id.*

Supposedly, Dianetics is a practical science that can cure many of man's problems by erasing the old imprinted engrams. According to Dianetics theory, the ordinary person, encumbered by the engrams of his reactive mind, is a preclear, similar to a computer that contains previously programmed instructions. Just as computer program instructions can be erased, a person's imprinted engrams can be erased. Dianetics' goal is to erase the programs and make persons clear, thus freeing the rational and analytic mind. *Id.*

The process of working toward clear is described as auditing. An auditor asks the person being audited a set of structured questions and drills, called rundowns, leading the subject or preclear along his time track discover-

ing and exposing engrams along the way. The auditor's goal is to detect the buttons that indicate a conscious or subconscious response to the rundown and enable the subject to identify his or her own engrams. Although the auditor works one-on-one with a preclear, the content of each session is not individually tailored. The process of auditing allegedly improves the physical as well as the spiritual condition of the subject. *Id.*

The E-meter plays an important part in the process of auditing. The E-meter is a skin galvanometer, similar to those used in lie detector tests. The subject holds two tin soup cans in his hands. The cans are attached to an electrical device. A needle on the device registers changes in the electrical resistance of the subject's skin when the subject answers the auditor's questions often addressing personal, intimate and confidential subject matters. Supposedly the auditor, using a set of complex rules and procedures, can identify the subject's emotional reaction to the questions by the analyzing the needle movement. Then the auditor uses the analysis to diagnose the mental and spiritual condition of the subject. Scientology provides doctrinal courses known as training for becoming an auditor. Like auditing courses, training courses are provided in sequential levels. *Id.* Auditors are sometimes young persons with no training other than having been audited themselves for a short period of time. (Memorandum of Law in Support of Defendants' Motion for Summary Judgment [Defendants' Support Memorandum], p. 2 (citing Transcript of hearings held by Clearwater's City Commission at vol. I, page 50 [hereinafter "Tr. at vol. pg."]). Auditors are paid directly by Scientology. *Founding Church of Scientology of Washington, D.C.*, 409 F.2d 1146.

Scientology receives most of its income from auditing and training, although it also sells E-Meters, books and tapes. *Id.* Scientology charges a fixed donation, also known as a price or a fixed contribution, for auditing services. *Hernandez v. Commissioner of Internal Reve-*

nue, 109 S.Ct. 2136, 2141 (1989) (citing *Church of Scientology of California v. Commissioner of Internal Revenue*, 823 F.2d 1310 (9th Cir. 1987), *cert. denied*, 108 S.Ct. 1752. The charges are set out in schedules. In 1972, auditing charges ranged from $625 for a twelve and one half hour session to $4,250 for a one hundred hour intensive session. *Id.* The system of mandatory fixed charges is based on Scientology's doctrine of exchange that requires an even balance between what a person pays to the organization and what he receives in return. *Id.* Scientology promotes auditing sessions through newspaper, magazine and radio advertisements and also through free lectures, free personality tests and leaflets. *Id.* In addition, Scientology encourages prepayment for the auditing services and allows a five percent discount for advance payment. *Id.*

Scientology will refund unused portions of prepaid auditing or training fees, less an administrative charge if the audited person believes that he or she has not received religious or spiritual benefit from his participation in the organization's activities. (Plaintiff's Memorandum in Support of Motion for Summary Judgment [Plaintiff's 1988 Support Memorandum], p. 5, note 5; Support Affidavits and Exhibits; Supplemental Sydejko aff., pp. 2-3, pars. 5, 6). "There is no membership in the Church as such; persons are accepted for auditing on the basis of their interest in Scientology (and presumably their ability to pay. . . .") *Founding Church of Scientology of Washington, D.C.*, 409 F.2d 1146. Payments for auditing services are not deductible charitable contributions under the Internal Revenue Tax laws because participants receive *quid pro quo* for their money. *Hernandez*, 109 S. Ct. 2136.

The Clearwater organization brings people from all over the world to receive Scientology training. In 1982, Clearwater, on the basis of complaints from the community about Scientology's activities (Defendants' Support Memorandum, p. 3 (citing Tr. at I 5)), Clearwater held a series of legislative hearings to determine whether

the municipality should initiate any action on the complaints. (*Id.* at I 5). The complaints included allegations of fraud based on the failure of auditing to provide promised physical, mental and other benefits, (*Id.* at I 7, 8) and on Scientology's failure to give promised refunds (*Id.* at III 81)

FACTS

1. On October 6, 1983, Defendant City of Clearwater (Clearwater) enacted Ordinance No. 3091-83, to become effective January 31, 1984. The purpose of the ordinance was to regulate charitable solicitations within the city. The ordinance required charitable organizations that wanted to solicit funds in Clearwater to register with the City, maintain specified records, disclose the sources and uses of their contributions, refrain from engaging in fraudulent solicitation practices and submit to an investigation by the City Attorney if ten or more individuals complained about the organization's activities. Clearwater patterned the ordinance after a similar Houston ordinance, upheld as constitutional by the Fifth Circuit Court of Appeals. *See International Society of Krishna Consciousness of Houston, Inc.* [*ISKCON*] *v. City of Houston*, 689 F.2d 541 (5th Cir. 1982) [hereinafter *Houston*].

2. On January 20, 1984, Americans United for Separation of Church and State (Americans United) brought an action in the Federal District Court of the Middle District of Florida (the Court) to enjoin Clearwater from enforcing the ordinance. Americans United claimed that the ordinance was unconstitutional.

3. On January 23, Scientology brought a separate action for injunctive relief on similar constitutional grounds. Both Plaintiffs moved for temporary restraining orders pursuant to Rule 65(b) of the Federal Rules of Civil Procedure.

The Court, pursuant to Rule 65(a)(2), F.R.Civ.P., consolidated the parties' motions for injunctive relief with

the trial on the merits, and scheduled a hearing on the issue of a permanent injunction. At the hearing, the parties requested the Court to limit the scope of the hearing to the facial validity of the ordinance. Clearwater stated that it would not challenge Scientology's standing, except as to the claims alleging that the ordinance violated the freedom of religion clauses of the first amendment. After argument on the facial validity of the ordinance, the Court directed counsel to file post-hearing Memoranda by March 16.

4. On March 15, Clearwater enacted Emergency Ordinance No. 3479-84, as an amendment to Ordinance No. 3091-83. The amended ordinance also comprehensively regulated charitable solicitation and effectively repealed Ordinance No. 3091-83. As an emergency ordinance, No. 3479-84 would automatically expire after 90 days if not passed as a non-emergency ordinance within that time. In addition, Ordinance 3479-84 explicitly provided for its expiration in 90 days. Clearwater notified the Court and Plaintiffs of the amended ordinance.

5. On March 28, the Court determined that Ordinance No. 3091-83 was unconstitutional and permanently enjoined its application and enforcement. The Court terminated the Americans United case by granting the parties' requested injunctive relief and dismissing the case. The Court also terminated the Scientology case, granting the requested relief and dismissing all but one count of the complaint. The Court retained jurisdiction for the enforcement of the executory provisions of its order.

6. On April 5, Clearwater appealed the District Court's injunctive orders as to Clearwater Ordinance 3091-83, pursuant to 28 U.S.C. § 1292(a)(1) (1982). Section 1292 provides that Courts of appeals have jurisdiction of appeals from interlocutory orders of the District Court's granting or refusing to grant injunctions.

7. On April 20, Scientology, seeking to enjoin the enforcement of Emergency Ordinance 3479-84, moved

the District Court for leave to amend the remaining count of its complaint. The proposed amendment set out the same constitutional challenges that Scientology had raised in opposition to the original ordinance. At the same time, Scientology moved the Court for a temporary restraining order prohibiting Clearwater from enforcing Ordinance No. 3479-84.

8. On May 17, Clearwater enacted Ordinance 3479-84 as a permanent ordinance.

9. On May 21, Americans United filed a new action in the District Court seeking injunctive relief and challenging the constitutionality of Ordinance No. 3479-84 on the grounds raised in its previous suit. Simultaneously, Americans United moved for a temporary restraining order, which the Court granted.

10. On May 24, Scientology filed a new suit, seeking essentially the same relief as Americans United. Scientology's action asks for declaratory and injunctive relief. Scientology contends that:

A) The amended ordinance was enacted to single out Scientology for harassment and persecution in violation of the establishment and free exercise clauses of the first amendment and the equal protection and due process clauses of the fourteenth amendment;

B) On its face and as applied to all religious groups, the amended ordinance violates the first, fourth, fifth and ninth amendments of the United States Constitution; sections 2, 3, 4, 5, 9, 17, and 23 of Article I of the Florida Constitution; Florida Statutes § 166.04(a); and Clearwater City Charter § 2.09. Scientology alleges that the case arises under 42 U.S.C. §§ 1983 and 1988, and 28 U.S.C. §§ 2201 and 2202.

11. The two Scientology cases and the American United case challenging the amended ordinance 3479-84 were not consolidated by the District Court.

12. On July 13, the District Court heard argument of Americans United and Scientology counsel at a scheduled hearing limited to the question of the facial constitutionality of Ordinance 3479-84. The Court consolidated Plaintiffs' applications for preliminary injunctive relief with the trial on the merits pursuant to Rule 65(a)(2). The Court found that Ordinance 3479-84 was facially constitutional. However, the Court encouraged an immediate interlocutory appeal to the Eleventh Circuit Court of Appeals, pursuant to 28 U.S.C. § 1292(b) (1982). The Court also issued a temporary restraining order enjoining Clearwater from enforcing the ordinance pending the disposition of any appeals that might be taken. In its written orders, the Court converted its temporary restraining orders to preliminary injunctions prohibiting Clearwater from enforcing the portions of the Ordinance 3479-84 that dealt with a charitable organization's obligation to register with the city and to maintain certain records.

13. On July 31, Scientology moved the District Court, in both of its cases, for a temporary restraining order prohibiting Clearwater from enforcing *all* provisions of the Ordinance 3479-84. Scientology also moved the Court to schedule an evidentiary hearing on its pending application for a preliminary injunction.

14. On August 2, the Court denied Scientology's motion for a temporary restraining order prohibiting Clearwater from enforcing Ordinance 3479-84 and denied Scientology's motion for a hearing on its application for a preliminary injunction.

15. On August 3, Scientology appealed the District Court's July 23 orders declaring Ordinance 3479-84 constitutional and enjoining the enforcement of less than all of Ordinance 3479-84. Scientology also appealed the District Court's August 2 order denying Scientology's motion for a temporary restraining order and a preliminary injunction.

16. On November 1, the Eleventh Circuit Court of Appeals:

A) vacated the District Court's order prohibiting Clearwater from enforcing repealed Ordinance 3091-83 because the controversy was moot; the Eleventh Circuit remanded the two cases with instructions that they be dismissed without prejudice;

B) dismissed the section 1292(b) interlocutory appeals from the District Court's determination that amended Ordinance 3479-84 was facially constitutional; the Eleventh Circuit vacated the orders that allowed the appeals to proceed;

C) affirmed the District Court's refusal to grant Scientology's applications for preliminary injunctions because Scientology failed to establish the criteria necessary for preliminary injunctive relief. The Eleventh Circuit also found that the District Court record did not support an adequate basis to justify a finding of standing.

17. On July 23, 1987, Scientology filed a motion for partial summary judgment on the issue of standing, and on January 15, 1988, filed a partial summary judgment on standing and the merits.

18. On January 15, 1988, Clearwater also filed a motion for summary judgment.

CLEARWATER ORDINANCE 3479-84

Clearwater Ordinance 3479-84 applies to charitable organizations that solicit funds or property within Clearwater and to charitable organizations that offer within the city to make sales of property including, but not limited to books, tapes, publications and brochures whose proceeds will be used for charitable purposes. Section 100.01. The ordinance exempts organizations that annually collect monies from less than twenty people in Clearwater or that annually collect less than $10,000 there. Section 100.02.

Covered organizations must file a registration statement with the City Clerk. Section 100.03. The statement requires the organization to provide information about the collection and disbursement of funds, including names, addresses, and phone numbers of the soliciting organization, the person in charge of soliciting funds in Clearwater, and the person authorized to disburse those funds; a description of the soliciting organization, the methods of solicitation and the use to be made of the funds; the time period of the solicitation; and estimate of salaries, fees and costs to be incurred in soliciting; the names of organization officials or solicitors who have been convicted of serious crimes in the last five years; the names of other Florida cities in which the organization has solicited; and a statement that the organization maintains records or documents necessary to file the registration statement. The registration is a public document.

An organization that files similar information elsewhere may submit that filing in lieu of the registration statement. An organization that solicits only from members may provide the information to its members in a private statement, available only to members, in lieu of the registration statement. The organization must prepare the statement at least annually, must maintain the underlying records for three years from the date of each statement, and must make the records and statement reasonably available for inspection by each member of the charitable organization. Section 100.02(3).

After an organization files its registration statement, the City Clerk must either issue a Certificate of Registration within ten working days or tell the organization what required information is missing from the statement. Section 100.03(2). If the Clerk does not issue a Certificate of Registration, the organization can continue to solicit in Clearwater without the statement until the Clerk's decision is upheld by a court. Section 100.03(3). The City bears the burden of initiating court proceedings, which it

must do within ten working days of the refusal of a permit. *Id.* In such proceedings, the organization can show that the missing information should not be required because furnishing it would impose a special hardship on the organization. Section 100.03(4).

The registration statement is effective for one year. Sixty days after the year is over, the organization must file a statement containing information as to the amount of funds and property collected in Clearwater during the year; the costs incurred for wages, fees, advertising, and other expenses; and the utilization of the proceeds in approximate amounts. Section 100.03(8).

Under the ordinance, certain acts are unlawful. These include willful failure to file required statements or knowingly filing false statements, fraud or misrepresentation to obtain money or property; promising any person that the proceeds of a solicitation of funds will be refunded upon request, and thereafter willfully failing to make a written refund request within 60 days; promising any person that he or she will receive a refund upon request without providing a written statement of the refund terms and conditions; knowing misrepresentation that a donor will obtain a federal tax deduction, willful use of solicited funds to commit a crime, and willful failure to maintain required records. Section 100.05.

The City Attorney is empowered to investigate alleged violations of the ordinance, but only if he has received ten bona fide, sworn complaints setting forth facts showing a violation and harm. Section 100.06(1). In an investigation, the city attorney can subpoena persons and records, Section 100.06(2), but he has no power to enforce his subpoenas and must go to court for enforcement. If an investigation shows probable cause to believe a violation exists, the City Attorney can prosecute. Section 100.06(3). Finally, the statute contains an explicit severability clause. Section 10.

STANDARD FOR SUMMARY JUDGMENT

This circuit clearly holds that summary judgment should only be entered when the moving party has sustained its burden of showing the absence of a genuine issue as to any material fact when all the evidence is viewed in the light most favorable to the nonmoving party. *Sweat v. Miller Brewing Co.*, 708 F.2d 655 (11th Cir. 1983) All doubt as to the existence of a genuine issue of material fact must be resolved against the moving party. *Hayden v. First National Bank of Mt. Pleasant*, 595 F.2d 994, 996-97 (5th Cir. 1979), (quoting *Gross v. Southern Railroad Co.*, 414 F.2d 292 (5th Cir. 1969)). Factual disputes preclude summary judgment.

The Supreme Court of the United States held, in *Celotex Corp. v. Catrett*, 477 U.S. 317 1986):

> In our view the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to establish the existence of an element essential to that party's case, and on which that party will bear the burden at trial.

Id. at 273.

The Court also said, "Rule 56(e) therefore, requires that the moving party go beyond the pleadings and by her own affidavits, or by the depositions, answers to interrogatories, and admissions on file, 'designate' specific facts showing there is a genuine issue for trial." *Celotex, supra*, at 274. This Court is satisfied that no factual disputes remain which preclude summary judgment.

A. Whether Scientology Has Standing to Sue.

Standing to sue is an aspect of Article III that limits federal judicial power to the resolution of cases and controversies. "A threshold question in every federal case is whether the Plaintiff has made out a justiciable case or

controversey within the meaning of Article III." *Church of Scientology Flag Service Organization v. City of Clearwater*, 777 F.2d 598, 606 (11th Cir. 1985) *cert. denied*, 106 S. Ct. 1973 (1986) (citing *Warth v. Seldin*, 422 U.S. 490, 498 (1975)). Determination that a litigant has standing to sue is a preliminary jurisdictional matter that should be decided "without consideration of the likelihood of the litigant's success on the underlying merits of the case." *Saladin v. City of Milledgeville*, 812 F.2d 687, 690 n.4 (11th Cir. 1987). The essence of the inquiry is . . .

> whether the parties seeking to invoke the court's jurisdiction have alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.

Larson v. Valente, 456 U.S. 228, 238-39 (1982) (citations omitted).

Standing includes constitutional and prudential requirements. To satisfy the minimum constitutional requirements, a plaintiff must show a) that he personally has suffered an actual or prospective injury as a result of the putatively illegal conduct; b) that the injury is fairly traceable to the challenged action; and c) that the injury is likely to be redressed by a favorable court decision. *See, e.g., Larson*, 456 U.S. at 239; *Valley Forge Christian College v. American United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982); *see also Church of Scientology Flag Service Organization*, 777 F.2d at 606.

Constitutional Issues

Actual or Threatened Injury. In some circumstances, a charitable solicitation registration requirement will confer standing on a litigant to contest the law. *Larsen v. Valente*, 456 U.S. 228, 241 (1982). Scientology claims that the Clearwater ordinance does so. Scientology claims

that it meets the injury test because it maintains and operates a facility exclusively for training and auditing in the City of Clearwater. (Hugh Wilhere aff., par. 4) and directs its Clearwater activities toward those who come to its facility to avail themselves of the facility's services. Scientology solicits money in Clearwater, and does so almost exclusively in the course of offering participation in the services of auditing and training. (*Id*; Sydejko aff., par. 18). Scientology also advertises and sells religious books to the general public, as well as to those involved with the Scientology organization in Clearwater. (Wilhere aff. par. 4; Sudejko aff. par. 19).

Scientology further alleges that it will suffer injury if Ordinance 3479-84 is enforced because Scientology is a charitable organization as defined by the ordinance: an organization "which is or holds itself out to be a religious" organization. Section 100.01(1). Scientology also engages in "solicitation of funds" as that term is defined in the statute since it requests money for the organization in the course of offering literature and participation in services and training.

The ordinance requires that charitable organizations soliciting funds in Clearwater file registration and disclosure statements with the city. Organizations and individuals may at some time be subject to penalties under the ordinance. Therefore, Scientology claims that it meets the injury in fact prong of the constitutional test.

Traceable Connection to the Challenged Action.

Scientology claims that it meets this prong of the constitutional requirements test because the reporting and registration requirements directly impact the organization's solicitation in Clearwater and the ordinance guidelines concerning refunds impact the organization's policies concerning refunds.

Redress By a Favorable Decision. Scientology claims that its injuries are likely to be redressed by a favorable

decision. Scientology is seeking a declaration that the ordinance is unconstitutional on its face and as applied to religions and other charitable organizations, and in particular, Scientology, and is seeking a permanent injunction against enforcement of the ordinance. (*See* Complaint, Prayer for Relief, pars. A-D). Such a ruling would redress almost all of the organizations' injuries.

In addition, Scientology seeks to enjoin enforcement of the ordinance provisions that require disclosure of solicitations from members, or on their own premises, and the provisions that set out guidelines for refund policies. A favorable decision on these issues would redress Scientology's alleged injuries in these areas.

Prudential Issues

In addition to the essential constitutional requirements a court must consider the case in light of three principles that might counsel judicial restraint, referred to as prudential considerations. *See Valley Forge Christian College*, 454 U.S. at 471, 474 (1979). While not jurisdictional, they are invoked to "limit the role of the courts in resolving public disputes." *Warth*, 422 U.S. at 500. These considerations are (1) whether the plaintiff's complaint falls within the zone of interests protected by the statute or constitutional provision at issue; (2) whether the complaint raises abstract questions amounting to generalized grievances that are more appropriately resolved by the legislative branches; and (3) whether the plaintiff is asserting his or her own legal rights and interests rather than the legal rights and interest of third parties; *Allen v. Wright*, 468 U.S. 737, 751 (1984).

Zone of Interest. Scientology contends that it meets the first prong of the prudential requirements test because the Clearwater ordinance *arguably* infringes on the zones of interest protected by the first amendment's associational, speech and religious guarantees. *Association of Data Processing Service Organizations v. Camp*, 397 U.S.

150 (1970) (emphasis added). Scientology claims that because the ordinance fails to exclude, from the reporting requirement, charitable contributions from its members, or on its premises, the ordinance violates the organization's first amendment rights.

Scientology further contends that the registration and reporting requirements and enforcement provisions infringe on associational and religious rights by permitting surveillance into Scientology's affairs and by pressuring Scientology to adopt certain policies and practices. In addition, Scientology claims that the ordinance provisions requiring the licensing of public solicitation and sale of literature infringe on first amendment rights of free expression and free exercise of religions.

Distinct Concrete Injury. Scientology claims that it meets the second element of the prudential requirements test because the ordinance inflicts a distinct, concrete injury on a limited set of charitable organizations, which specifically includes the Scientology organization. In addition, Scientology alleges that the legislative history of the ordinance shows that the ordinance is aimed at Scientology. (Wilhere aff., par. 7 & 8).

Legal Claims Raised. Scientology claims that it meets the third element of the prudential requirements test because it can invoke the constitutional protection afforded all organizations for associational and expressive activities, whether they are religious or not. *See Roberts v. United States Jaycees*, 468 U.S. 609 (1984). Further, Scientology claims that it has standing to raise the legal claims because it is a religion, or because the over-breadth doctrine would give it standing. In reality, almost all of Scientology's arguments are premised on its claim to be a religious organization.

Scientology's Standing To Raise Legal Claims As a Religion

American courts have adopted an expansive definition of religion. *Seeger v. United States*, 380 U.S. 163, 174, 180 (1965). Determining whether a set of beliefs is a religion under a modern definition of religion would include consideration, among other things, of whether the ideas or beliefs in question address issues of fundamental or ultimate concern, whether the ideas are combined into a comprehensive belief-system and whether there are any formal, external, or surface signs that may be analogize to accepted religions. Such signs might include formal services, ceremonial functions, clergy, and efforts at propagation. *Malnak v. Yogi*, 592 F.2d 197 (3d Cir. 1979) (Adams, J. concurring).

The affidavits submitted by Scientology indicate that Scientology meets some of the modern definitional elements of religion. (*See* Reverend Sydejko aff., par. 4, 9, 10, 11, 12, 13; Dr. Frank Flinn aff., par.s 9, 10, 12, 13, 14; Kliever aff., par.s 6, 7-12, 13, 16, 17). Scientology is incorporated as a church and it has ministers with the legal authority to marry and to bury. The fundamental writings of the church contain a general account of man and his nature comparable in scope to that of some recognized religions. *Founding Church of Scientology of Washington, D.C.*, 409 F.2d at 1154. Scientology is propagated by a mother church in California and by numerous branch churches around the world. The mother church instructs laity, trains and ordains ministers, and creates new congregations. Branches, known as franchises or missions, provide Scientology services at the local level. *Id.* The affidavits address *only* the religiosity of Scientology's beliefs; they do not address the religiosity of Scientology's activities.

Although American courts have adopted an expansive definition of religion, a party must demonstrate that it is a religion if challenged. *See Larson*, 456 U.S. at

255-256, n.30 ("[N]othing in our opinion suggests that appellants could not attempt to compel the Unification Church to register under the Act as a charitable organization not entitled to the religious-organization exemption, and put the Church to the proof of its bona fides as a religious organization."); *International Society for Krishna Consciousness, Inc. v. Barber*, 650 F.2d 430, 438 (2d Cir. 1981) (It must be "determin[ed] whether the Krishna beliefs, credos, and philosophy, as well as the particular practice of sankirtan, are sufficiently 'religious' in nature to warrant the protection of the free exercise guarantee."); *Jones v. Bradley*, 590 F.2d 294, 295 (9th Cir. 1979) ("There is no prohibition . . . against ruling whether or not a set of beliefs constitutes a religion when deciding if First Amendment protection apply.").

Clearwater claims Scientology has not proven that it is a religion, but "[e]ven if Scientology is a religion, the actions at issue here are commercial, and sometimes criminal, in character." (Defendants' Support Memorandum, p. 13). Defendants point out specific passages 1982 municipal hearing transcripts that illustrate illicit acts and practices allegedly carried on by Scientologists (Defendants' Support Memorandum, pp. 4-10);

> Burglaries of the offices of doctors, lawyers, and government officials to obtain documents and information for use against critics or opponents (Tr. at I 89, 179, 232, 242; IV 156, 162, 260, 262, 290, 291, 292, 293, 302, 303); electronic bugging of medical offices and government offices to obtain information for use against critics or opponents (Tr. at I 121, 152; III 338-339; IV 9, 20-21, 134, 156, 321, 326, 334); "framing" opponents by manufacturing and planting false evidence (Tr. at I 40, 101, 102, 212; Iv 137, 326, 334); use of highly confidential information, which was obtained through "auditing" and was supposed to remain confidential,

to blackmail persons who leave the organization (Tr. at I 75, 98, 204-205; II 24, 26-27, 61-62, 200; III 20; Iv 10, 26, 37, 61-62, 81, 116-117, 155, 173, 183, 185, 192-193, 214, 240-242, 270, 364-365); beating, kidnapping, and imprisoning persons who wished to leave the organization (Tr. at I 84-85, 99, 122-123, 242; II 24, 37, 132, 135, 183-184, 214; III 103, 271; IV 50-51, 57-58, 245-246, 287, 417-418); fraudulently inducing individuals to pay large sums of money for Scientology "training" by falsely claiming that Scientology can cure mental and physical ailments and will enable a person to achieve great success; by falsely stating that L. Ron Hubbard was a war hero, had healed himself of terrible wounds, is a nuclear physicist, and is an eminent and accomplished research scientist; and by false promises of refunds (Tr. I 73, 113-114, 124, 264-265, 269, 282, 287-288; II 104; III 81, 281; IV (, 22-23, 25, 72-73, 75-76, 108-110, 152-153, 285, 286); maintaining poor living conditions for low level Scientologists who work at church bases (Tr. at I 59-60, II 166, 249, 250-251; III 10, 11, 98, 149, 157, 188, 268, 269, 270; IV 16, 53, 98, 119-120, 228, 245-246).

Although Clearwater alleges that Scientologists commit the acts set out above, it states, "For purposes of the summary judgment motions, Defendants shall not assert that the *beliefs* of Scientology are not religious in character." (Defendants' Memorandum in Opposition to Plaintiff's Motion for Summary Judgment [hereinafter Defendants' Opposition Memorandum], p. 3). Clearwater further states, "[S]cientology may have religious beliefs. . . (*Id.* at 5).

Scientology's beliefs developed from Hubbard's writings:

L. Ron Hubbard, writing in a science fiction magazine in the 1940's, first advanced the extravagant

> false claims that various physical and mental illnesses could be cured by auditing. He played a major part in developing Scientology. Thereafter, commencing in the early 1950's numerous Scientology books and pamphlets were written explaining how various illnesses can be and had been cured through auditing. These materials were widely distributed. . .
>
> Hubbard and his fellow Scientologists developed the notion of using a E-meter to aid auditing. Substantial fees were charged for the meter and for auditing sessions using the meter. Auditing was guaranteed to be successful. . . Unfortunately, the Government did not move to stop the practice of Scientology and a related "science" known as Dianetics when these activities first appeared and were gaining public acceptance. . . . The government did not sue to condemn the E-meter until the early 1960's, by which time a religious cult known as the Founding Church of Scientology had appeared. This religion, formally organized in 1955, existed side-by-side with the secular practice of Scientology. Its adherents embrace many of Hubbard's teachings and widely disseminate his writing. The church purports to believe that many illnesses may be cured through E-meter auditing by its trained ministers through an appeal to the spirit or soul of a man. As a matter of formal doctrine, the Church professes to have abandoned any contention that there is a scientific basis for claiming cures resulting from E-meter use.

United States v. Article or Device, 333 F. Supp. 357 (D. D.C. 1971)

Based on the *Article or Device* court's analysis and the affidavits cited above, this Court finds that Scientology fulfills the elements of the modern definition of religion; for purposes of considering the motions for summary judgment, the Court will consider Scientology to be a religion.

Scientology's Claim To Raise Legal Claims Under the Overbreadth Doctrine

The overbreadth doctrine is an exception to the rule that individuals may not litigate the rights of third parties. See *Barows v. Jackson*, 356 U.S. 249, 255 (1953). "[A]n individual whose own speech or expressive conduct may validly be prohibited or sanctioned is permitted to challenge a statute on its face because it also threatens others not before the court—those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 503 (1985).

Generally, where the parties challenging the facial validity of a statue are those who seek to engage in the activity that the overbroad statute purports to punish, courts will not entertain an overbreadth challenge. *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984). In some cases, the overbreadth doctrine may be employed *only* if the contested regulation violates the rights of those not before the Court. *Id.* Resorting to the overbreadth doctrine is this case is not necessary since this Court has found that Scientology meets the definition of a religion for purposes of the summary judgment motions. Consequently, the Court finds that Scientology has standing and grants Scientology's motion for summary judgment on this issue.

FIRST AMENDMENT GUARANTEES

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the government for a redress of grievances." U.S. Const. amend. I. First amendment rights and guaranties are fundamental, but they are not absolute or unrestricted, and they are subject to reasonable limitation and control.

Freedom of Religion

The guarantee of freedom of religion was adopted to curtail Congress' power to interfere with the individual's freedom to believe, to worship, and to express the dictates of his conscience. *Wallace v. Jaffree*, 472 U.S. 38 (1985) (silent prayer law unconstitutional). Both the anti-establishment clause and the free exercise clause are applied to the states through incorporation into the fourteenth amendment due process guarantee of liberty. *Everson v. Board of Education*, 330 U.S. 1 (1947) (anti-establishment); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (free exercise). The two clauses often appear to conflict, and reconciling these potentially conflicting constitutional demands is a continuing problem. The basic role of the government has been to maintain a position of neutrality. While the Court has not directly defined religion, it has indicated that non-theistic beliefs can qualify for constitutional protection. *Seeger*, 380 U.S. 163.

The Establishment Clause. States may not make laws respecting the establishment of religion. Courts interpret this clause broadly to prohibit laws that aid one religion, aid all religions, or prefer one religion over another. *Everson*, 330 U.S. 1.

In most cases, a law must satisfy each part of a three-part test to withhtand an Establishment Clause challenge: (1) the law must have a secular legislative purpose; (2) the principal or primary effect of the law must neither advance nor inhibit religion; and (3) the law must not foster "an excessive government entanglement with religion." *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

Improper administrative entanglement may arise when religious and public employees must work closely together to carry out a legislative plan. *See Aguilar v. Felton*, 473 U.S. 402, 414 (1985) (citing *Walz v. Tax*

Commissioner, 397 U.S. 664, 674 (1970)). Administrative entanglement claims commonly arise in suits to strike down government benefits to religion; *e.g.*, when government aid is followed by government investigators who must make on-site inspection to ensure that aid moneys are expended only for secular purposes. *See Aguilar*, 473 U.S. at 412. Day-to-day intrusion into the operation of a religious institution is entanglement. Impermissible entanglement occurs if a law allows the state to investigate the financial affairs of religious organization when the goal of the investigation is to determine whether regulation is necessary. *Surinach v. Pesquera de Busquets*, 604 F.2d 73 (1st Cir. 1979).

Regulatory entanglement claims arise when parties seek to show that enforcement of a law would create excessive entanglement. *Tony and Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290 (1985). Potentially, regulatory entanglement claims permit religious bodies to use the establishment clause, like the free exercise clause, as a shield from government intrusion. *See e.g., McClure v. Salvation Army*, 460 F.2d 553 (5th Cir.), *cert. denied* 409 U.S. 896 (1972) (religious organization exempt from some sex discrimination suits under Title VII); *Madsen v. Erwin*, 395 Mass. 715, 418 N.E.2d 1160 (1985) (Christian Science Monitor, as religious organization, immune from some employment discrimination suits).

The Court has specifically criticized the three-part *Lemon* test and often departs from the test in making decisions. *See Marsh v. Chambers*, 463 U.S. 783 (1983) (Court upheld prayers opening legislative session, emphasizing the prayer's historical acceptance making it a "part of the fabric of our society."). The Court has criticized the entanglement prong of the test because the supervision necessary to ensure that there is no entanglement becomes entanglement. *See, e.g., Aguilar*, 473 U.S. at 429 (O'Connor, J. dissenting); *Wallace*, 472 U.S.

at 109-110 (Rehnquist, J. dissenting); *Lynch v. Donnelly*, 465 U.S. 668, 689 (1984) (O'Connor, J. concurring); *Lemon*, 403 U.S. at 666-668 (White, J. concurring and dissenting). However, the three-part *Lemon* test remains the basic standard of judicial review in Establishment Clause cases.

Free Exercise of Religion. States may not make laws that inhibit the free exercise of religion. "The freedom to hold religious beliefs and opinions is absolute." *Braunfeld v. Brown*, 366 U.S. 599 (1961). (*See West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943) (law requiring Jehovah's Witness to salute the flag struck down because government cannot prescribe what is orthodox in politics, nationalism, religion, or other matters of opinion). The government may not evaluate the benefits of religious practice including the truth or falsity of statements about the benefits of religious practices under any circumstances. *United States v. Ballard*, 322 U.S. 78 (1944); *Founding Church of Scientology of Washington D.C.*, 409 F.2d 1146.

While freedom to believe is absolute, freedom to act pursuant to one's religion cannot be. "Conduct remains subject to regulations for the protection of society." *Cantwell*, 310 U.S. at 303-304. The government has the inherent police power to regulate religious activities in a reasonable and nondiscriminatory manner, to protect the safety, peace, order, and comfort of society. *Id.* Although the state cannot punish religious views and belief, the state can punish the external manifestation of those views if the resulting conduct is a clear and present danger to the safety, morals, health or general welfare of the community and is violative of laws enacted for their protection. *Portland v. Thornton*, 174 Or. 508, 149 P.2d 972 *cert. denied* 323 U.S. 770, (1944).

An ordinance directed at conduct rather than belief, with a secular purpose and effect, and justified by governmental interest in public health and safety does not

violate first amendment rights. *Church of the Lukumi Babalu Ave, Inc. v. City of Hialeah*, 723 F. Supp. 1467 (S.D. Fla. 1989). The right to free exercise does not relieve an individual's obligation to comply with a "valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." *Employment Division, Department of Human Resources of Oregon v. Smith*, 108 L. Ed. 876 (1990), citing *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) and *Prince v. Massachusetts*, 321 U.S. 158 (1944). An ordinance that could constitutionally apply to a wide range of conduct other than the conduct of the challenging religious group does not violate first amendment rights. *Lukumi*, 723 F. Supp. 1467 (municipal ordinances regulating ritual sacrifice of animals not unconstitutional).

When community problems exist, a city ordinance triggered by the conduct of a particular group is constitutionally valid if the purpose of the ordinance is to address the community problem. *Id.* The first amendment does not require strict religious neutrality. *See Wallace*, 472 U.S. at 82-83 (O'Connor, J. concurring); *McDaniel v. Paty*, 435 U.S. 618, 639 (1978) (Brennan, J. concurring (noting that "government [may] take religion into account when necessary to further secular purposes"). Courts have uphold laws explicitly mentioning religious conduct so long as the laws serve a secular purpose. *See e.g., Jones v. Butz*, 374 F. Supp. 1284, 1292-93 (S.D. N.Y. 1974).

Although laws cannot establish religion or prohibit its free exercise, laws can control criminal acts connected with religion. Criminal acts are not "any less odious" because they are sanctioned by a particular sect as religion. *Davis v. Beason*, 133 U.S. 333, 345 (1890). "However free the exercise of religion may be, it must be subordinate to the criminal laws of the country. . ." *Id.* at 342-343. Otherwise, "the professed doctrines of re-

ligious belief [would be] superior to the law of the land," and the result would be "to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances." *Reynolds v. United States*, 98 U.S. 145, 167 (1878) (quoted in *Davis*, 133 U.S. at 344).

That the government can regulate religiously based activities in the exercise of its power to promote the health, safety and general welfare, *Wisconsin*, 406 U.S. at 220; *See also Bob Jones University v. United States*, 461 U.S. 574, 603 (1983), is illustrated by the numerous statutes courts have upheld precluding or impairing religious actions that violate civil or criminal laws. Thus, polygamy can be banned. *Reynolds*, 98 U.S. 145; *Davis*, 133 U.S. 333. Child labor can be barred. *Prince*, 321 U.S. 158. Parents can be punished for failing to provide children with medical attention. *State v. Hermanson*, —— So. 2d —— (Fla. 2d DCA 1990). The use of poisonous snakes in religious services can be forbidden. *Harden v. State*, 216 So. 2d 708 (Tenn. 1948). The use of marijuana, LSD and peyote can be punished. *Employment Division*, 108 L.Ed. 876. *Leary v. United States*, 383 F.2d 851 (5th Cir. 1967), *rev'd on other grounds*, 395 U.S. 6 (1969); *State v. Bullard*, 148 S.E. 2d 565 (N.C. 1966), *cert. denied*, 386 U.S. 917 (1967). Violation of zoning laws can be prohibited. *Grosz v. City of Miami*, 721 F. 2d 729 (11th Cir. 1983), *cert. denied*, 105 S. Ct. 108 (1984).

Even neutral laws of general application that *significantly burden* religious liberty may be constitutional. *Lee*, 455 U.S. 252 (mandatory and continuous participation in the social security system vital to integrity of the system); *Tony & Susan Alamo Foundation*, 471 U.S. 290. However, the government must avoid administrative entanglement with religious institutions. *Walz v. Tax Commission of the City of New York*, 397 U.S. 664 (1970); *Lemon*, 403 U.S. 602. Generally appli-

cable administrative and recordkeeping regulations may be imposed on religious organizations without violating the first amendment. Routine regulatory interaction that involves no inquiry into religious doctrine, no delegation of state power to a religious body, and no detailed monitoring and close administrative contract between secular and religious bodies does not violate the non-entanglement command. *Jimmy Swaggart Ministries v. Board of Equalization of California*, 110 S.Ct. 688 (1990) (citing *Hernandez*, 109 S.Ct. 2136).

Until recently, government actions that burdened religious free exercise had to be justified by showing that the government had a compelling purpose and no less burdensome means of achieving the purpose of the regulation. *Sherbert v. Verner*, 374 U.S. 398, 406 (1963). *See also Wisconsin*, 406 U.S. at 215 (purpose must be of highest order). *But cf. Employment Division*, 108 L Ed. 876. However, after *Employment Division, Department of Human Resources of Oregon v. Smith*, the compelling government interest test is no longer required when the government action involves a religion-neutral criminal law. The *Employment Division* court stated:

> [g]enerally applicable, religion-neutral criminal laws that have the effect of burdening a particular religious practice need not be justified, under the free exercise of religion clause . . . by a compelling governmental interest because (1) if the general laws were to be subjected to a "religious practice" exemption, both the importance of the law at issue and the centrality of the practice at issue would reasonably have to be considered, (2) it is inappropriate for judges to determine the "centrality" of a belief to an individual's religion, (3) thus, if the "compelling interest" test were to be applied at all, it would have to be applied across the board, to all actions thought to be religiously commanded, (4) such a rule would open the prospect of constitutionally required religious exemptions from civic obliga-

> tions of almost every conceivable kind, a result that is not required by the F rst amendment's protection of religious liberty, and (5) the nation cannot afford the luxury of deeming presumptively invalid, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order; although it may be that leaving accommodation of religious practices to the judicial process will place at a relative disadvantage those religious practices that are not widely engaged in, such an unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weight the social importance of all laws against the centrality of all religious beliefs.

To pass a constitutional challenge against infringement of the free exercise clause, a law must regulate conduct rather than belief, and the law must have a secular purpose and effect. If the law passes these threshold tests, the court balances the cost to the government of altering its activity to allow the religious practice to continue unimpeded versus the cost to the religious interest imposed by the government activity. *Grosz*, 721 F.2d at 734.

Solicitation and the First Amendment

Public solicitation is protected under the first amendment because solicitation is a form of communication. *Village of Schaumberg v. Citizens for a Better Environment*, 444 U.S. 620, 632 (1980); *Cantwell*, 310 U.S. 296; *Fernandes v. Limmer*, 663 F.2d 619 (5th Cir. 1981). However, solicitation is subject to reasonable regulation. The state has an important interest in regulating solicitation activities to avoid disturbances of the peace and to insure public safety. *Cantwell*, 310 U.S. 296. A regulation that does not involve any religious test and does not unreasonably obstruct or delay the collection of funds is constitutionally valid, even though the collection is for a religious purpose. *Id.*

A state or municipality also has an interest in prohibiting fraud in solicitation. "Public awareness of abuses in the administration of charitable fund raising practices has increased over the past twenty years." *Houston*, 689 F.2d at 541. The state can protect its citizens from fraudulent solicitation and insure that funds raised actually find their way to the organization for which the solicitation was given by requiring a stranger in the community to establish his identity and his authority to act for the cause he purports to represent before permitting him to publicly solicit funds for any purpose. *Cantwell*, 310 U.S. at 306. Disclosure is a less intrusive means for protecting citizens than prohibiting solicitation entirely. *Schaumburg*, 444 U.S. 620.

However, a solicitation regulation must bear a "reasonable relationship to the achievement of the governmental purpose asserted as its justification." *Branzburg v. Hayes*, 408 U.S. 665, 700 (1972). For example, the state can require solicitors to disclose that they are professional solicitors at the time of solicitation, and can require a subsequent written affirmation of the disclosure. *Indiana Voluntary Firemen's Association, Inc. v. Pearson*, 700 F. Supp. 421 (S.D. Ind. 1988). However, the state cannot compel disclosure about the solicitors' contract with the charitable organization or other details that solicitors would not voluntarily disclose. *Id.* Neither can the state regulate the percentage of contributions a charitable organization expends for services of professional solicitors. *Shannon v. Telco Communications, Inc.*, 824 F. 2d 150 (1st Cir. 1987); *Secretary of State v. Joseph H Munson Company*, 467 U.S. 947 (1984); *Schaumburg*, 444 U.S. 620; *Riley v. National Federation of the Blind of North Carolina, Inc.*, —— U.S. ——, (1988). The regulatory authority may not attempt to regulate the content of the representations made to induce contributions on the basis that the representations falsely state spiritual, emotional or other benefits that may accrue to the contributor in this world or the next. *United States v. Ballard*, 322 U.S. 78 (1944).

Any regulation of public solicitation must be by the least restrictive means necessary to further the state interests. *Fernandes,* 663 F.2d 619. A regulation must not allow administrative and enforcement officials excessive discretion as to the scope or breath of the regulation. *Hynes v. Mayor and Council of the Borough of Oradell,* 425 U.S. 610 (1976); *Schaumburg,* 444 U.S. 620.

An ordinance imposing a flat license tax for the privilege of canvassing or soliciting within a municipality is unconstitutional when the tax is applied to the dissemination of religious beliefs through the sale of religious books and pamphlets by solicitation from house to house. *Murdock v. Pennsylvania,* 319 U.S. 105 (1954).

Summary Judgment Contentions

Scientology alleges that: a) it meets the constitutional and prudential requirements necessary to establish standing; b) the Clearwater ordinance is unconstitutionally overbroad and violates Plaintiff's first amendment rights because the ordinance regulates fundraising by churches from their own members and on their own premises; attempts to regulate matters of internal ecclesiastical rule, custom, discipline and procedure; and regulates and requires broad financial disclosure of church fundraising for general church purposes; c) the Clearwater ordinance unconstitutionally vests excessive and vaguely defined discretion on city enforcement officials; d) the Clearwater ordinance unconstitutionally seeks to regulate and license the sale of books and literature in violation of the first and fourteenth amendments. [Throughout its motion, Scientology relies on the *Houston* ordinance to support its arguments].

Clearwater refutes Scientology's claims, argues that Clearwater Ordinance 3479-84 is constitutional on its face and that, because there are no genuine issues of material fact needing to be resolved, Clearwater is entitled to summary judgment in its favor.

B. *Whether the Clearwater Ordinance Is Overbroad and Thus Interferes With Freedom of Association.*

Freedom of Association

Freedom of association is not stated directly in the constitution but is implied in the first amendment. *See Tashjian v. Republication Party of Connecticut,* 479 U.S. 208, 214 (1986) (citing *NAACP v. Alabama ex. rel. Patterson,* 357 U.S. 449, 460 (1958)) (freedom of association protected by first and fourteenth amendments includes partisan political organization).

The Supreme Court identified two types of associations in *Roberts,* 468 U.S. 609. The first type is the intimate human relationship exemplified by relationships involving the creation and sustenance of a family, including marriage, childbirth, raising and educating children, and cohabitation with one's relatives. *Id.* at 619 (citations omitted). Intimate relationships, which demand the fullest protection, are characterized by small numbers, a high degree of selectivity, and seclusion from others. *Id.* at 620. "As a general matter, only relationships with these sorts of qualities are likely to reflect the consideration that have led to an understanding of freedom of association as a intrinsic element of personal liberty." *Id.*

The second type of identified association, apposite to an intimate association, is an express association, exemplified by large business associations. *Id.* A large business association lacking the qualities of the intimate association "seems remote from the concerns giving rise to . . . constitutional protection." *Id.* "Between the poles lies a broad range of human relationships that may make greater or lesser claims to constitutional protection from particular incursions by the State." *Id.* Some general principles of group protection have emerged.

Generally, laws that directly punish group membership or association are invalid *See Noto v. United,* 367 U.S. 290, 297-98 (1961); *Elfbrandt v. Russell,* 384 U.S. 11

(1966) as are laws that regulate internal activities such as whom to include as members and which non-members to invite to take part in the group processes. *See March Fong Eu, Secretary of State of California v. San Francisco County Democratic Central Committee,* 489 U.S. 214 (1989) (statute restricting organization and composition of official governing bodies of political parties and terms of office of state central committee invalid).

Laws that withhold a privilege or benefit from the members of a group or association and laws that compel disclosure of a group's membership or an individual's associations, where anonymity is likely to be important to the continued viability of associational ties, are also invalid. *See Gibson v. Florida Legislative Investigation Committee,* 372 U.S. 539 (1963); *Greene v. McElroy,* 360 U.S. 474 (1959); *NAACP v. Alabama ex rel. Patterson,* 357 U.S. 449, 463-65 (1958)

Laws that interfere in hierarchial religious associations' decisions regarding control of church real property, appointments to church positions and discipline are generally invalid. *See Serbian Eastern Orthodox Diocese v. Milivojevich.* 426 U.S. 696, 710 (1976) (attempt to control defrocking procedures in a religious organization invalid; courts must accept such decisions of the highest ecclesiastical tribunal as final and binding) (citing *Watson v. Jones,* 80 U.S. (13 Wall.) 679, 727 (1872)); *Paul* v. *Watchtower Bible Tract Society of New York,* 819 F.2d 875 (9th Cir. 1987) (religious practice of shunning is affirmative defense to suit for defamation and intentional infliction of emotional distress by church member against Jehovah's Witness organization). However, charitable and religious groups are subject to law and courts have sustained the power of enforcement officials to investigate infractions by obtaining documents and information pursuant to subpoenas and production orders. *See e.g., United States v. Coates,* 692 F.2d 629 (9th Cir. 1982); *United States v. Dykema,* 666 F.2d 1096 (7th Cir. 1981), *cert. denied,* 456 U.S. 983 (1982); *United States v. The*

Freedom Church, 613 F.2d 316 (1st Cir. 1979); *In re Rabbinical Seminary Netzach Israel Ramailis*, 450 F. Supp. 1078 (E.D. N.Y. 1978); *see Church of Scientology of California v. Commissioner*, 83 T.C. No. 25 Slip. Op at 123, 125, *aff'd*, 823 F.2d 1310 (9th Cir. 1987).

Overbreadth

Overbreadth is concerned with the precision of a law. A statute is void on its face if it "does not aim specifically at evils within the allowable area of [government] control, but . . . sweeps within its ambit other activities that constitute an exercise" of protected expressive or associational rights. *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940) (statute prohibiting all picketing void on its face since it bans peaceful picketing protected by first amendment).

The question of how overbroad a statute must be before it is subject to facial invalidation is difficult. The Supreme Court has "never held that a statute should be held invalid on its face merely because it is possible to conceive of a single impermissible application. *City of Houston v. Hill*, 482 U.S. 451 (1987) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 630 (1973) (Brennan, J. dissenting)).

Testing the constitutionality of a statute on its face is to some degree "fundamentally at odds with the function of the federal courts" to resolve concrete cases and controversies. *Younger v. Harris*, 401 U.S. 37, 52 (1971). Application of the overbreadth doctrine to facially invalidate a statute is "manifestly, strong medicine," and the Court is reluctant to resort to the doctrine. *Broadrick*, 413 U.S. at 630.

The overbreadth doctrine will not apply unless the protected acts affected by the statute are substantial when compared with the law's legitimate applications to unprotected acts, even when the acts in question are pure speech. *See New York v. Ferber*, 458 U.S. 747, 770-71 (1982).

" '[S]ubstantial overbreadth' is essentially a case-by-case analysis under which the court scrutinizes the statute's apparent overbreadth, judges it 'in relation to the statute's plainly legitimate sweep,' *Broaderick*, 413 U.S. at 615, and ascertains whether, in relation to that 'legitimate sweep,' the statute's overbreadth is 'substantial' or 'marginal.' " *Indiana Voluntary Firemen's Association*, 700 F. Supp. 421. The overbreadth doctrine does not apply at all to commercial speech. *Friedman v. Rogers*, 440 U.S. 1, 10-11 n.9 (1979). Closely related to the overbreadth doctrine is the less restrictive means test which requires that the means used to pursue a legitimate and substantial governmental purpose must be the least restrictive means possible. *Shelton v. Tucker*, 364 U.S. 479, 488 (1960).

A. Whether the Clearwater Ordinance Affects Organization-Member Relationships

Ordinance 3479-84 requires organizations to file a registration statement or make available to its members a private disclosure statement. Scientology claims that the Clearwater ordinance is unconstitutionally overbroad because it does not exempt solicitations by charitable organizations of their own members on their own premises. Scientology claims that while Clearwater may be able to require disclosure of contributions from the public, Clearwater cannot require disclosure of contributions from members, or on the organization's premises without violating the overbreadth doctrine because freedom of association is protected by the first amendment and freedom of association prevents interference with the internal affairs of an organization.

Clearwater contends that the City can require Scientology and other organizations to disclose information because the City has a compelling government interest in preventing fraud, criminal and antisocial action and disclosure to members and the public will expose and thus prevent fraud. Clearwater argues that regulation of char-

itable disclosures is the least intrusive means of accomplishing the City's purpose of preventing fraud.

Clearwater argues that while the Supreme Court has ruled that disclosure laws and penal laws are both less intrusive alternatives than prohibition of solicitation, disclosure laws are even less intrusive than criminal ones. Clearwater points out that government can obtain and at trial make public the very same types of information required to be provided under a disclosure law when investigating and prosecuting crimes such as fraud under a criminal statute. But the penalty imposed at the conclusion of a criminal prosecution is jail or a fine. The only penalty imposed for accurate revelation of information pursuant to a disclosure law is that a potential contributor, upon learning of the information, may decide not to contribute. Clearwater contends that the penalty of non-contribution is less intrusive than the penalty of jail or a fine. As the Fifth Circuit states, "It is difficult to see what less intrusive alternative there could be to a disclosure law. *Houston,* 689 F.2d at 550.

Clearwater claims that hierarchial religious organizations would become a law unto themselves if they were immune from laws such as Clearwater's charitable solicitation ordinance. Clearwater further contends that the private statement provision of the Clearwater ordinance provides for the exemption of organizations that solicit only from members or on their own premises, and that if an organization requires a hierarchial tenet of secrecy, then members can simply ignore the private statement. Section 100.02(3) of Ordinance 3479-84 reads as follows:

> Section 100.02. Exemptions.
>
> (3) If a charitable organization does not want to disclose publicly the information required by the statements described in Section 100.03 regarding the solicitation of funds from members of the charitable organization, it may exclude this information from the statements required by Section 100.03 if:

(a) it indicates on the statement required by Section 100.03 that information about solicitation of funds from members of the charitable organization has been excluded, and

(b) it prepares a private statement at least annually that contains all of the information required by the statements described in Section 100.03 for the solicitation of funds from members of the charitable organization that is not reported in the statements required by Section 100.03, which is signed under oath by the individual described in subparagraph 1(c) of Section 100.03, and

(c) it maintains the records and documents that are necessary to complete this private statement for a period of three years from the date of each statement, and together with the private statement, makes them reasonably available for inspection by every member of the charitable organization.

The Court examined the history of Clearwater Ordinance 3479-84 to determine the origin of the private statement provision. The Court found that Ordinance No. 3091-83, the predecessor of ordinance 3479-84, exempted solicitation from members and on organization premises. The applicable provision of the original ordinance read:

Section 100.02 Exemptions.

(1) Notwithstanding the foregoing, a charitable organization shall be exempt from the provision of this chapter (1) if it does not receive contributions from more than 20 persons; or (b) all of its functions, including fund raising activities, are carried on by persons who are unpaid for their services; or if no part of the organizations assets or income inure to the benefit of or is paid to any officer or member; or if the solicitation is in the form of a donation or collection that occurred within the membership of the charitable organization; or if the charitable organiza-

tion does not raise or receive contributions from the public . . .

Section 100.01 Definitions.

(5) The term "member" shall mean any person regularly attending or participating in a charitable organization.

When this Court, in its order of March 28, 1984, found that Ordinance 3091-83 was unconstitutional, the Court addressed the membership exemption:

Clearwater Ordinance 3091-83 exempts those churches which limit their solicitations to those who regularly attend or participate in religious services (Section 100.01(5). Churches which obtain contributions from members who participate in church services on a non-regular or episodic basis, as well as churches which do not offer, encourage, or require regular attendance or regular participation of their members are not exempt. Thus a stable church membership requiring regular attendance need not be affected by this ordinance; however, a church whose membership is growing and actively engaged in proselytizing and fund raising falls under the regulatory scheme of this ordinance.

How can a church whose congregation or group of members is growing, ever, at any given time, indicate to civil authority the number of "members" it has in regular attendance or as participants in the organization?

If a drunk were to stagger into a church and "be saved" and then indicate an intention to dedicate his life to its purposes through regular attendance at that church, would he be a "member"?

There is absolutely no showing of any compelling state interest being furthered by the parameters of the limited membership exemption of this ordinance.

> This ordinance not only implies a religious preference, its mere presence could foster a stagnation of religious practice in Clearwater by impacting on growing congregations and forestalling larger, more organized churches from continuing to seek new members as well.

Clearwater amended its ordinance to include organizations that solicited from members and only on their premises, but provided a private statement provision to allow organizations that solicited only from members or only their premises to opt out of the disclosure requirement.

The comparable membership exemption provision in the Houston ordinance cited by Scientology throughout its memorandum was also found unconstitutional by the trial court judge, but for another reason. *Houston*, 689 F.2d at 553. The Houston judge ruled that the phrase "exempting organization or associations" if they solicit from their own "members" was constitutionally infirm because the terms were not defined. The judge pointed out that the "concept of membership in a religion eludes objective definition."

After the trial judge ruled the Houston exemption clause unconstitutional because it was vague, Houston did not amend its ordinance as Clearwater did. Instead, Houston appealed the trial court's decision and the appellate judge reversed, pointing out that the term "organization and member" are commonly understood and that the phrase was not vague. Therefore, the Houston ordinance contains an exemption provision for organizations that solicit from members only while the Clearwater ordinance cor tains an optional private statement provision that accomplishes the same purpose. Neither ordinance contains a provision exempting religious organizations.

In its brief to the Eleventh Circuit, Clearwater claims that Scientology actively participated in the early drafting

of the ordinance and "when an earlier draft of the ordinance exempted solicitations by a religious organization from its own members, they [Scientology] said this discriminated against groups which solicited from the public. When the membership exemption was removed to accommodate their view, they said now the ordinance intruded on religion because it regulated the relationships between a religious organization and its members, and the only permissible regulation was of relations between a religious organization and the public." Brief for Appellees at 24, *Church of Scientology Flag Service Organization v. City of Clearwater*, 777 F.2d 598, 606 (11th Cir. 1985) (Nos. 84-3574, et al.).

Even though the availability of the private statement option appears to refute Scientology's argument that the Clearwater ordinance is unconstitutional because it fails to exempt organizations that solicit only from their members, the Court will address Scientology's other contentions, and will assume, *arguendo*, that the private statement option is not available.

Scientology cites no case law that directly supports its position that failure to exempt solicitations by charitable organizations of their own members on their own premises invalidates the ordinance. Scientology claims that *Houston*, 689 F.2d at 553, supports its view and claims that the *Houston* Court upheld the Houston ordinance because it exempted both solicitation by organizations of their members and solicitation on the organization's own premises. *Id.* at 556. The Court disagrees with Scientology's reading of *Houston*: the *Houston* Court upheld the Houston ordinance over ISKCON's objection that the ordinance was unconstitutional *because* it exempted members on their premises, thereby favoring institutionalized religions (which had members and premises on which to solicit) over uninstitutionalized religions. *Houston* did not imply that a statute requiring registration by organizations that solicited only from members would be uncon-

stitutional. Scientology's reliance on the Houston ordinance does not support its argument on this issue.

Scientology also cites *National Foundation v. City of Fort Worth,* 415 F.2d 41 (5th Cir. 1969) as support for its position. Again, the Court finds that Scientology's reliance is misplaced. The *Fort Worth* Court upheld an ordinance that exempted organizations soliciting only from members as constitutional; *Fort Worth* did not imply that an ordinance that did not exempt such organizations would be unconstitutional.

Scientology's reliance on *Watson,* 80 U.S. (13 Wall.) 679 is not clear. Under *Watson,* courts will not interfere in ecclesiastical disputes. The present situation does not involve an ecclesiastical dispute. Therefore, the Court finds that neither *National foundation* nor *Watson* support Scientology's claim for invalidation of the ordinance.

The circumstances under which the Houston and the Clearwater ordinance were enacted differ greatly. The purpose of the Houston ordinance was to protect the public. Judge Wisdom stated, "During this time [the past twenty years] as is reflected in the case law, some Krishna followers and others soliciting funds for charitable purposes, particularly in airports, parks, and public gatherings, have pursued their overzealous solicitation to the point of causing undue annoyance of the public. Many local governmental authorities have reacted by adopting regulations requiring the licensing of solicitors for charitable or religious purposes." That the Houston ordinance "exempt[ed] from disclosure requirements the internal communications between members of an organization or association" is not surprising. *Houston,* 689 F.2d at 553. "Such communications are not related to the governmental purposes of the ordinance," protecting the public. *Id.*

This Court cited *Houston* for that proposition in *Church of Scientology v. City of Clearwater,* Civ. No. 84-96 (Slip Opinion 3/28/84, p. 6). The Court pointed out

that regulations such as those in the Houston ordinance should be limited to solicitation of the public in public places because activity on the organization's premises could not disturb the public and because there would not be a danger of misrepresentation by the organization when it solicited from its own members.

Many charitable solicitation cases involve ordinances designed to protect the public, and not members of the organization, against fraudulent solicitation. *See, e.g., Schaumburg*, 444 U.S. 620. In *Schaumburg* the Court said, "The Village's interests in protecting the public from "fraud, crime, and undue annoyance" are "indeed substantial . . . Efforts to promote disclosure of the finances of charitable organizations also may assist in preventing fraud by informing the public." *Id.* at 637-8. That such ordinances exempt charitable organizations' solicitation from members or on their premises is logical.

However, when the purpose of an ordinance is to protect the members of the organization as well as the public against fraud, exempting solicitation from members and on the organization's premises would thwart the purpose of the statute. The purpose of the Clearwater ordinance is to prevent fraud against the members as well as the public. Therefore, the ordinance logically includes disclosure from organizations soliciting only from members, although the Clearwater ordinance provides an option by private statement to exclude such organizations. Scientology claims that an ordinance that requires disclosure but fails to exempt organization that solicit only from members is unconstitutional on its face, even when the ordinance provides an alternative private statement that allows the organization to opt out of the disclosure requirements, because the ordinance impacts its freedom of association by interfering with intra-member relations.

This Court has evaluated Scientology's claim that the ordinance violates associational freedom and finds that Scientology's claim is without merit. First, the ordinance

does not directly punish group membership or association, *See Noto v. United*, 367 U.S. 290, 297-98 (1961); *Elfbrandt v. Russell*, 384 U.S. 11 (1966), nor does the ordinance regulate internal activities such as whom to include as members and which non-members to invite to take part in the group processes. *See March Fong Eu, Secretary of State of California v. San Francisco County Democratic Central Committee*, 489 U.S. 214 (1989).

Nor does the ordinance withhold a privilege or benefit from the members of a group or association or compel disclosure of a group's membership or an individual's associations. *See Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539 (1963); *Greene v. McElroy*, 360 U.S. 474 (1959); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 463-65 (1958).

Since there is no ecclesiastical dispute in this situation, the ordinance cannot interfere in a hierarchial religious decision regarding such things as control of church property, appointments to church positions and discipline. *See Serbian Eastern Orthodox Diocese.* 426 U.S. at 710 (citing *Watson* 80 U.S. (13 Wall.) at 727)); *Paul*, 819 F.2d 875.

The Court also examined the applicability of the overbreadth doctrine to the present situation. The overbreadth doctrine will not apply unless the protected acts affected by the statute are substantial when compared with the law's legitimate applications to unprotected acts, even when the acts in question are pure speech. *See Ferber*, 458 U.S. at 770-71.

The Court finds that the ordinance is not overbroad when analyzed in light of first amendment freedom of association caselaw. Consequently, the Court finds that Scientology's overbreadth claim is without merit and denies Scientology's motion for summary judgement on this issue.

Refund Provisions

Scientology also alleges that the refund provisions found in section 100.05(1)(f) and (g) of Ordinance 3479-84 interfere with intra-member relations. Sections 100.05(1)(f) and (g) read as follows:

> Section 100.05. Prohibited Acts.
>
> No charitable organization subject to the provisions of this chapter, or no agent, employee or officer of any such organization, shall engage in any of the following prohibited acts:
>
> (f) promising any person that the proceeds of a solicitation of funds will be refunded upon request, and thereafter willfully failing within 60 days to make a refund that has been requested in writing;
>
> (g) promising any person that refunds of the proceeds of any solicitation of funds will be made upon request without providing such person, at the time such representation is made, with a written statement of the terms and conditions upon which refunds are made; provided, however, that any statement made in good faith at the time is not prohibited by this section.

Scientology contends that the provisions unconstitutionally interfere with their exchange doctrine relating to payment for auditing and training sessions. However, Scientology's concern is moot since payments for auditing and training are no longer tax deductible charitable contributions under Internal Revenue Code § 170. *Hernandez*, 109 S.Ct. 2136. The *Hernandez* court found that payments for auditing are part of

> a quintessential *quid pro quo* exchange; in exchange for their money, those being audited receive an identifiable service, namely auditing and training sessions. *Id.* Scientology establishes fixed price schedules for auditing and training sessions in each branch church;

> it calibrates particular prices to auditing or training sessions of particular lengths and levels of sophistication; it returns a refund if auditing and training services go unperformed [less an administrative discount]; it distributes account cards on which persons who have paid money to Scientology can monitor prepaid services they have not yet used; and it categorically bars provision of auditing or training sessions for free." *Id.* at 2145. Scientology promotes auditing through newspaper, magazine, and radio advertisements, free lectures, free personality tests and leaflets. *Id.* at 2141. Scientology encourages prepayment and awards prepayment with a 5% discount. *Id.* A Scientology direction states: "Price cuts are forbidden under any guise . . . PROCESSING MAY NEVER BE GIVEN AWAY BY AN ORG. processing is too expensive to deliver . . . 9. ONLY FULLY CONTRACTED STAFF IS AWARDED FREE SERVICE, AND THIS IS DONE BY INVOICE AND LEGAL NOTE WHICH BECOMES DUE AND PAYABLE IF THE CONTACT IS BROKEN. *Id.* at 2145 n.9 (citing *Graham v. Commissioner,* 83 T.C. at 577-578, n.5).

Because payments for auditing and training are no longer tax deductible charitable contributions, these payments are no longer covered by the Clearwater ordinance. Therefore, Scientology's arguments about this issue are not applicable.

The Court recognizes that Scientology and other organizations may offer refunds unrelated to an organizational doctrine such as the doctrine of exchange. No regulation could require that an organization offer a refund. However, when a voluntary offer of a refund is made at the time of solicitation, a regulation can constitutionally require that a written affirmation also be given. *See Indiana Voluntary Firemen's Association,* 700 F. Supp. at 442, 447 (citing *Riley v. National Federation of The*

Blind of North Carolina, Inc., 487 U.S. 781 (1988) (ordinance requiring written affirmation of disclosure statements made at the time of solicitation upheld, even when the disclosure was a compelled statement regarding the solicitor's professional status). By analogy, Section 100.05(1)(g) of Clearwater Ordinance 3479-84 is constitutional. Section 100.05(1)(g) requires written affirmation only if a promise of a refund is *voluntarily* made.

Likewise, Section 100.05(1)(f), making it unlawful to willfully fail to honor a written request for a promised refund within sixty days is constitutional. A municipality has an interest in protecting against refund fraud similar to the interest a city has in insuring that funds raised actually find their way to the organization for which the solicitation was given. *Cantwell*, 310 U.S. at 306. Regulating to protect against the latter is constitutional. Analogously, regulating to protect against the former should also be constitutional.

Sections 100.05(1)(f) and (g) do not mandate excessive entanglement. They do not require surveillance or inspection. Clearwater would have no involvement with these provisions unless ten bona fide sworn complaints were filed with the City Attorney regarding the organization's policy and an investigation ensued. The ordinance does not require regulatory interaction that inquires into religious doctrine, nor delegation of state power to a religious body, nor detailed monitoring and close administrative contact between secular and religious bodies. *Hernandez*, 109 S.Ct. at 2147 (citations omitted). *See Tony and Susan Alamo Foundation*, 471 U.S. 290. A situation similar to on-site continuing inspection of day-to-day operations is necessary before entanglement occurs. *Swaggart*, 110 S.Ct. 688.

This Court finds that Scientology's arguments regarding the invalidity of Sections 100.05(1)(f) and (g), the "refund provisions" are not persuasive and denies summary judgment to Scientology on this issue.

Prohibiting the Use of a Scheme or Artifice To Defraud

Scientology also alleges that the City Attorney's power to investigate and prosecute under Section 100.05(1)(c) of Ordinance 3479-84 is an unconstitutional infringement of the relationship between churches and their members. Section 100.05(1)(c) prohibits the "use of any scheme or artifice to defraud or obtain property by means of any false statement or representation" Scientology further claims that civil authorities cannot "delve into the details of religious practice for the purpose of judging its veracity or belief."

Clearwater contends that charitable and religious groups are subject to law, and that enforcement officials have the power to investigate infractions by obtaining documents and information pursuant to subpoenas and production orders. Clearwater further alleges that law enforcement officials have both the power and the responsibility of investigating fraud complaints.

While this Court agrees with Scientology's claim that officials cannot determine the veracity or benefits of a religious belief, the Court does not agree with Scientology's claim that officials cannot investigate allegations of fraud or other unlawful conduct because the investigation would unconstitutionally interfere with the relationship between churches and their members. The United States Supreme Court, in *Employment Division* held that religious organizations are not exempt from civil and criminal laws and pointed out that "the nation cannot afford the luxury of deeming presumptively invalid, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order." Courts have sustained the power of officials to investigate whether religious organization have violated the law, *See Coates,* 692. F.2d 629; *Dykema,* 666 F.2d 1096; *United States v. Rasheed,* 663 F.2d 843 (9th Cir. 1981), *cert. denied* 454 U.S. 1157 (1982). The Court finds Scientology's

arguments unconvincing and denies summary judgment to Scientology on this issue.

Full Disclosure Requirement

Scientology alleges the full disclosure requirement allows Clearwater to dictate a particular form of organizational government because hierarchically organized groups do not permit all members to know such matters as the salaries of officials or the aggregate assets of the organization, and the members would acquire such knowledge under the disclosure requirement. Scientology also contends that by allowing the City Attorney to investigate on the basis of ten bona fide sworn complaints, the ordinance allows dissident members or factions of the church the power of the state to compel church leaders to govern their churches in accordance with civil authority's standards. Scientology asserts that because the City Attorney can subpoena the private records and statements, Scientology is forced to maintain records, even if it chooses to provide a private statement. Ultimately these records could become public under the investigatory powers of the City Attorney.

Clearwater contends that organizations requiring secrecy because of hierarchal organization can use the private statement option; the ordinance does not require that members read the private statement or the supporting records. In addition, Clearwater points out that organizations are protected against disclosure because they can claim hardship rather than disclose the information on their registration statements. If a Certificate is denied, organizations can continue to solicit. Clearwater must initiate a court proceeding within 10 days to determine whether or not the Certificate was validly denied. Clearwater emphasizes that Section 100.03(4) states:

> In such judicial proceedings, a charitable organization may also raise the question to the court that furnishing a specific item or items of information or

> explanations under this chapter constitutes a special or unique hardship to the charitable organization, and the court shall have jurisdiction in such review process, upon concluding that disclosure constitutes a unique or special hardship, to dispense with the furnishing of that information or explanation, so that a Certificate of Registration can be issued.

The Court, not the City Clerk or other official determines whether the disclosure constitutes a unique or special hardship. Therefore, no City official has discretion as to the hardship standard. As *Scientology* points out, if the city official determines whether the hardship standard applies, the hardship standard is vague. (Plaintiff's 1988 Support Memorandum, p. 45 (citing *Munson,* 467 U.S. 947). Clearwater contends that because the judicial review process built into Ordinance 3479-84 mandates that a Court determine whether information is required or not, organizations are protected from unconstitutional disclosure of harmful information. *See Freedman v. Maryland,* 380 U.S. 51 (1965); *Southeastern Promotions Ltd. v. Conrad,* 420 U.S. 546 (1975).

Further, Clearwater points out that the City Attorney, as a member of the legal profession, is competent to distinguish between bona fide and frivolous complaints and is ethically required to uphold the standards of the legal profession. Clearwater contends that because ten complainants must prove harm before the City Attorney instigates an investigation, dissident members could not impact the organization. However, Clearwater also points out that if ten people have valid complaints, whether they are dissidents or not, they deserve the protection of the legal system.

Clearwater further argues that an ordinance can constitutionally require organizations to maintain records. *See Tony and Susan Alamo,* 471 U.S. 290 (religious organizations not exempt from secular governmental activity such as fire inspections, building and zoning regula-

tions, or the recordkeeping requirements of the Fair Labor Standards Act). *See also Swaggart,* 110 S.Ct. 688. However, Clearwater points out that records may never become public even if ten bona fide sworn complaints are filed, the complainants prove harm, and the city attorney instigates an investigation. The City Attorney's subpoena power under the ordinance, Section 100.06, can only be enforced through the courts, and would be subject to self-incrimination limitations. Granting Subpoena Power to Community Relations Board, 075-11 Annual Report of the Att'y Gen., 16, 17 (1975).

Clearwater also contends that Scientology has not changed the structure of the organization despite disclosure resulting from various lawsuits and that Scientology remains a flourishing organization with a large income and extensive assets despite disclosure. *See Church of Scientology of California v. Commissioner,* 823 F.2d 1310 (initial 1975 tax case, decided in 1984 involved year long audit, three or four full-time agents; review of approximately two million items including financial records, policy issues, membership fees and descriptions, contracts for services and employment, organizational charts, newsletters and disseminations pieces, and similar records illustrating organizational activities and financial practices, a fifty-one day trial spread out over a year covering Scientology's corporate and management structure, financial activities, banking practices, dissemination practices, techniques, beliefs and relationship to an alleged trust). *Id.* at 26, 50.

The Court finds that Scientology's arguments are not convincing. The Clearwater ordinance has built in safeguards to prevent unnecessary disclosure: the private statement, required judicial review, and the required application of legal standards such as basing an investigation only on bona fide complaints and finding probable cause prior to prosecution, Therefore, the Court denies summary judgment to Scientology on this issue.

Whether the Recordkeeping Requirements of the Clearwater Ordinance Violate the Establishment Clause.

States may not make laws that aid one religion, aid all religions, or prefer one religion over another. *Everson,* 330 U.S. 1. In most cases, a law must satisfy each part of a three-part test to withstand an Establishment Clause challenge: (1) the law must have a secular legislative purpose; (2) the principal or primary effect of the law must neither advance nor inhibit religion; and (3) the law must not foster "an excessive government entanglement with religion." *Lemon,* 403 U.S. 602.

Regulatory entanglement claims arise when parties seek to show that enforcement of a law would create excessive entanglement. *Tony and Susan Alamo Foundation,* 471 U.S. 290. Day-to-day intrusion and excessive surveillance are necessary before excessive regulatory entanglement occurs. On-site inspections of appellant's evangelistic crusades, lengthy on-site audits, examination of appellant's books and records, and threats of criminal prosecution, administrative and judicial proceedings are not excessive entanglement. *Swaggart,* 110 S. Ct. 688.

Scientology claims that the recordkeeping requirements of Ordinance 3479-84 are broad and intrusive and would result in excessive regulatory entanglement with Scientology's affairs. Scientology further claims that Clearwater has the burden of showing that implementation of the ordinance will not infringe on and entangle it in Scientology's affairs. *Acorn v. City of Frontenac,* 714 F.2d 813, 817 (8th Cir. 1973) and *Braintree Baptist Temple v. Holbrook Public Schools,* 616 F. Supp. 81, 90 (D.C. Mass. 1984).

Scientology further claims that the under the ordinance, Clearwater would have to "engage in 'comprehensive, discriminating and continuing . . . surveillance' " of the organization. It further claims that mere information gathering has the potential for substantially infringing the

exercise of first amendment rights and cites *NLRB v. Catholic Bishop*, 440 U.S. 490 (1979) for this proposition.

Scientology also contends that courts in *Sylte v. The Metropolitan Government of Nashville and Davidson County*, 493 F. Supp 313 (M.D. Tenn. 1980) and *Taylor v. City of Knoxville*, 566 F. Supp 925 (E.D. Tenn. 1983) struck down ordinances containing recordkeeping and disclosure provisions virtually identical to those in the Clearwater Ordinance because they resulted in impermissible entanglement with church affairs. According to Scientology, just the requirement of disclosure amounts to entanglement. (Plaintiff's 1988 Support Memorandum, p. 38).

Clearwater contends that the informational requirements of the Clearwater ordinance do not place an undue burden on any charitable or religious organization. As evidence, Clearwater cites examples of organizations that complied with the previous ordinance (Defendants' Support Memorandum, pp. 28-30 and Exhibits), the opinion of John O'Connor, legal counsel for March of Dimes (*Id.* at 30 and exhibits), sample charitable organization disclosure reports, and certified copies of organizations' registration statements filed in other jurisdictions. (*Id.* at 30-35 and Exhibits). Clearwater also cites to National Attorneys General, *State Regulation of Charitable Trusts and Solicitations* (1977), the Internal Revenue Code, and statistics regarding other municipalities that have adopted charitable regulation ordinances to support its contention. (Defendants' Support Memorandum, pp. 36-40 and Exhibits 18 and 25)

Further, according to Clearwater, there is no ongoing surveillance that produces excessive entanglement because the city only becomes involved if there are ten bona fide complaints and an investigation ensues. The City has no day-to-day or on-site involvement with the charitable organization. *See Tony & Susan Alamo Foundation*, 471 U.S. 290; *Swaggart*, 110 S.Ct. 688.

The Court analyzed the cases cited by Scientology to support its contention that the Clearwater ordinance would create entanglement if enforced. The Court does not find the cases persuasive. First, while Scientology claims that *NLRB v. Catholic Bishop of Chicago,* 440 U.S. 490 (1979) held that mere information-gathering sought by government officials is impermissible in the religious context, this Court reads the case to stand for the proposition that the National Labor Relations Act did not confer jurisdiction for the NLRB to certify unions as bargaining agents for lay teachers in church-operated schools. The *NLRB* Court pointed out the chilling effect that the requirement of bargaining would impose on the exercise of the bishops' control over the religious mission of the schools.

The Court also considered *Sylte v. Metropolitan Government of Nashville and Davidson County,* 493 F.Supp. 313 and distinguishes the case on the facts. The *Sylte* Court struck down the Nashville ordinance because a Nashville solicitation Board could investigate the affairs of any person soliciting. The Board had the power to "have access to and inspect books, records, papers, and facilities of applicants or of anyone making solicitation in the area of Metropolitan Government." The Board could also delegate their power to any person approved by the Board. In its investigation, the Board could hold hearings and at the hearing inquire into the need to further the religious beliefs, and ask for information "as the Board might reasonably require to determine whether the solicitation is in the interest and not inimical to the public welfare." The ordinance set out no standards by which the Board was to make determinations. The Board could investigate "where questions arose," and no provision was made for a judicial hearing. The Board had "unfettered power to obstruct the collection of funds for religious purposes." *Id.* at 319. *Sylte* is not relative to the present case because the Clearwater ordinance provides for a judicial hearing prior to denial of a Certificate of Regis-

tration; there is no board with unlimited discretion to investigate anyone soliciting "when questions arise"; and the City Attorney's investigatory power cannot be delegated. Therefore *Sylte* does not support Scientology's contention that excessive entanglement would follow the enforcement of the Clearwater ordinance.

The facts in *Taylor v. City of Knoxville*, 566 F. Supp. 925 also distinguish that case from the present controversy. The *Taylor* Court addressed issues similar to those addressed in *Sylte*. In *Taylor*, a Board had authority:

> to investigate the affairs of any person soliciting for religious purposes under a certificate. . . and to make public their findings in order that the public may be fully informed as to the affairs of any said person. Said person shall make available to the Board . . . or any person designated by the Board . . . all books, records, or other information. . .

Unlike the Clearwater ordinance, the *Taylor* ordinance set up no pre-investigation prerequisites such as ten bona fide complaints, and the ordinance provided no procedural safeguards such as requiring judicial process for enforcement of subpoenas. *Taylor* does not support Scientology's contention that excessive entanglement would follow the enforcement of the Clearwater ordinance.

This Court studied Scientology's interpretation of deposition testimony offered in support of its contention that the Clearwater ordinance creates excessive entanglement. (Plaintiff's 1988 Support Memorandum, p. 38). The Court does not find Scientology's interpretation persuasive. For example, Scientology claims that, "according to the City Clerk [Mrs. Williams], she might refuse to grant a solicitation certificate altogether unless, in her view, the intended use of the funds furthers a legitimate charitable purpose of the church. (William's Deposition 74-76). The Court disagrees with Scientology's interpretation of Mrs. Williams' statements and their effect on the certification granting process.

Scientology appears to assert that because the Clearwater ordinance requires disclosure, entanglement will occur. The Court does not find this argument persuasive. Entanglement requires specific actions such as on-going surveillance and day-to-day on site inspection. Therefore, the Court denies summary judgment to Scientology on this issue.

C. *Whether the Clearwater Ordinance Is Vague and Confers Excessive Discretion on Officials for Enforcement*

Vagueness is concerned with the clarity of a law. A law must be drawn with sufficient clarity so that people know the conduct they must take to avoid the sanction of the particular law. "[A]ny law is unconstitutionally vague if 'people of common intelligence must necessarily guess at its meaning and differ as to its application.'" *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926). Under procedural due process, a statute is not constitutionally fair if it fails to give enough information so that people can avoid unlawful conduct. "The applicable standard, however, is not one of wholly consistent academic definitions of abstract terms. It is, rather, the practical criterion of fair notice to those to whom the statute is directed. The particular context is all important." *American Communications Association v. Douds*, 339 U.S. 382, 412 (1950).

In addition, a law must provide explicit standards for those who apply it to prevent arbitrary and discriminatory enforcement. *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972). A vague law impermissibly delegates basic policy matters to policemen, judges and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Id.* However, "[T]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *Liberman v. Schesventer*, 447 F. Supp. 1355 (M.D. Fla.

1978) (citing *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961). Judicial review before action is taken meets the requirements of procedural due process. *Freedman*, 380 U.S. 51; *Southeastern Promotions Ltd. v. Conrad*, 420 U.S. 546 (1975).

Scientology alleges that Ordinance 3479-84 is unconstitutionally vague and that it vests excessively broad and undefined discretion in its enforcing officials. Scientology provides no facts or argument to support its assertion that the ordinance fails to provide persons a reasonable opportunity to know what is prohibited.

To suport its argument of broad and undefined discretion, Scientology once again uses the Houston ordinance as a yardstick for measuring the constitutionality of the Clearwater ordinance. Scientology claims that the Houston ordinances does not confer excessive discretion on city officials, but claims that Sections 100.03(2) and (3) and 100.05(1)(b) of the Clearwater ordinance do. Scientology claims that the Clearwater "issuing official has broad authority to engage in selective and discriminatory enforcement and to interfere with protected activities in several significant respects." Scientology claims that the Clearwater provisions give the Clearwater City Clerk and City Attorney authority to "determine the sufficiency of registration statements, and in the case of the City Attorney, the truth or falsity of information contained there." The Clearwater provisions read as follows:

> Section 100.03. Registration with City Clerk.
>
> (2) After a review of the registration statement to determine its compliance with this section, and within ten (10) working days of the receipt of the registration statement, the City Clerk shall either issue a Certificate of Registration, as provided in this section, or notify the person registering that the registration statement does not comply with the requirements of this section and specifically point out

what information or explanation has not been furnished that is required before a Certificate of Registration will be issued.

(3) If for any reason the City Clerk refuses to issue a Certificate of Registration to any charitable organization that has filed a registration statement and the charitable organization disagrees with this decision, the City of Clearwater shall bear the burden of initiating, within ten working days of the denial, a judicial proceeding in the form of a declaratory judgment action pursuant to Chapter 86, Florida Statutes, to review the City Clerk's refusal to grant a registration certificate. In such proceeding, the charitable organization seeking the Certificate of Registration shall be considered a party in interest. Unless or until the circuit court rules that the City Clerk has properly refused to issue a Certificate of Registration, the charitable organization may solicit funds without compliance with the registration provisions of this chapter.

100.05 Prohibited Acts.

No charitable organization subject to the provisions of this chapter, or no agent, employee, or officer of any such organization, shall engage in any of the following prohibited acts: 1. (b) wilful failure to file any statement required by this chapter or knowingly making false statements or providing false information in these statements.

The comparable provision in the Houston Ordinance, which Scientology claims does not confer excessive discretion is Section 37-45.

Houston City Ordinance

Section 37-45. Issuance of Certificate of Registration.

> After a review of the registration statement to determine its compliance with Section 37-43 above, and within ten (10) working days of the receipt of the registration statement, the City Tax Assessor and Collector shall either issue a Certificate of Registration, as provided in Section 37-47, or notify the person registering that the registration statement does not comply with the requirements of Section 37-43 above and specifically point out what information or explanation has not been furnished that is required before a Certificate of Registration can be issued.

The Court compared the provisions and found no significant differences between the discretion the city officials have to approve a Certificate of Registration under either ordinance. The Clearwater ordinance appears to offer more protection to an individual applying for a Certificate of Registration because under Section 100.03 (3) only a court can deny a Certificate of Registration.

In addition, Scientology alleges that the Houston ordinance was upheld partly because of the removal, by amendment, of the investigatory and *prosecutorial* powers of the city officials. Scientology states: "It was the removal, by amendment, of the investigatory and prosecutorial powers of the Houston Ordinance . . ." that was critical to the Court's holding the ordinance constitutional. (Plaintiff's 1988 Supporting Memorandum, p. 40). Scientology claims that the removal of the following language removed investigatory and prosecutorial power: [The city tax assessor and collector shall] "examine the application and to make such investigation as he may deem necessary to ascertain the truth and the facts and information set out therein." *Houston*, 689 F.2d at 543.

This Court does not find any prosecutorial powers inherent in this statement, or that the Houston ordinance contained any prosecutorial powers at any time. Prosecu-

torial or enforcement powers were not part of the Houston ordinance because Houston has a separate enforcement provision for city ordinances. (Statement of City Attorney's Office, Houston).

However, some solicitation ordinances do contain enforcement provisions. For example, the Court in *Indiana Voluntary Firemen's Association*, 700 F. Supp. at 425 upheld the following enforcement provisions in a solicitation regulation ordinance:

> First, the attorney general may bring an action to enjoin a violation of the statute—and to receive such injunctive relief, the state 'is not required to establish irreparable harm but only a violation of a statue or that the requested order promotes the public interest.' Ind. Code § 23-7-8(c). Second, for each violation of the Statute, the state may be awarded civil penalties of up to five hundred dollars ($500). *Id.* Third, and most significantly, any person who 'knowingly or intentionally' fails to make the disclosures prescribed in section 23-7-8-6 thereby commits a Class A infraction, subjecting that person to a possible adverse judgment of up to ten thousand dollars ($10,000) plus costs. Ind. Code §§ 23-7-8-8(d).

Scientology also contends that Section 100.06 of the Clearwater ordinance gives the City Attorney extraordinarily broad powers to investigate and prosecute violations of the ordinance, including use of subpoenas to compel the production of persons or documents, and the institution of legal proceedings. Section 100.06 reads:

> Section 100.06. Power of the City Attorney to Investigate and Prosecute Prohibited Acts of Charitable Organizations.
>
> 1. The City Attorney shall investigate alleged violations of this chapter only after ten individuals file separate bona fide complaints in writing, sworn to

> or affirmed, with the City Attorney, setting forth facts demonstrating that one or more of the prohibited acts set forth in Section 100.05 have been engaged in by the charitable organization and that the complaining party has been injured by each act or acts.
>
> 2. The City Attorney, when conducting an investigation pursuant to subparagraph 1 shall have the power to subpoena any person, require the production of the records or documents described in Section 100.04 and the private statement and records or documents described in Section 100.01(3), and administer oaths.
>
> 3. If the investigation conducted under subparagraph 1 demonstrates that probable cause exists to believe that a violation or violations under Section 100.05 exist, then the City Attorney shall institute an action to prosecute such violation or violations.

Clearwater argues that Scientology's objection to the investigatory power of the City Attorney is frivolous because the City's law enforcement officer always determines whether to investigate suspected violations of law and how extensive an investigation should be. Clearwater claims that the ordinance actually diminishes the City Attorney's power to investigate since the City Attorney cannot investigate alleged violations of the ordinance unless ten individuals file separate bona fide complaints setting forth facts showing that unlawful acts have been committed. The ten complaints must be sworn to or affirmed. A prosecution can be brought only after an investigation subsequent to the complaints demonstrates probable cause to believe there were violations. Subpoenas issued by the City Attorney during an investigation are not self-executing. The City Attorney must go to court to enforce them. Therefore, an organization can refuse to obey the subpoena unless ordered to comply by a neutral and detached court, and in court the or-

ganization can put forth any and all of its statutory and constitutional arguments to attempt to dissuade the tribunal from enforcing the subpoena.

Clearwater points out that in defining action that constitutes a violation of the ordinance, the ordinance explicitly states, in almost all instances that the violative act must be willful or knowing. In the other instances violations are acts that are inherently willful or knowing (such as using a scheme or artifice to defraud by means of false representations). Section 100.05(1)(c).

Clearwater points out that the Supreme Court has held that government " 'has broad discretion' as to whom to prosecute." *Wayte v. United States*, 105 S. Ct. 1524, 1530-31 (1985). *See also Newman v. United States*, 382 F.2d 479, 480 (D.C. Cir. 1967). " '[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute . . . generally rests entirely in his discretion.' " *Wayte*, 105 S.Ct. at 1531 (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978)).

Clearwater further alleges that charitable and religious organizations cannot validly claim that their first amendment rights of speech or religions are a bar to laws requiring them to keep information and to disclose it to the public and to government investigators acting pursuant to subpoena. Clearwater contends that if the first amendment did bar such information and disclosure requirements, charities and religions would be above the law and would be able to commit violations with impunity from detection, punishment and deterrence. Government, as the Supreme Court has said, would, "exist only in name." *Reynolds*, 98 U.S. 145.

The Court finds Clearwater's arguments persuasive. Therefore, the Court denies summary judgment to Scientology on this issue.

D. *Whether the Clearwater Ordinance Violates First Amendment Guarantees Because the Definition of Soliciting Funds Includes the Sale of Products Upon the Representation, Express or Implied, that the Proceeds Will Be Used for a Charitable Purpose.*

Clearwater Ordinance 3479-84 Section 100.01(2) reads:

> (2) The term "solicit funds" or "solicitation of funds" shall mean any request, within the City of Clearwater for the donation of money, property, or anything of value, or the pledge of a future donation of money, property, or anything of value; or the selling or offering for sale of any property, real or person, tangible or intangible, whether of value or not, including but not limited to, goods, books, pamphlets, tickets, publications or subscriptions to publications, or brochures, upon the representation, express or implied, that the proceeds of such sale will be used for a charitable purpose as such term is herein defined. Expressly excluded from the meaning of "solicit funds" or "solicitation of funds" is any offer of membership in any charitable organization. A solicitation of funds is complete when the solicitation is communicated to any individual then located within the corporate limits of the city."

Scientology alleges that under this provision, "a charitable organization, such as a church, a social club, or a university book store may not sell a pamphlet, a book, a ticket to a theatrical production, or a magazine without obtaining a license in the form of a Certificate of Registration." (Plaintiff's 1988 Support Memorandum, p. 47). Scientology also alleges that M.A. Galbraith, Clearwater City Attorney, in a deposition, indicated that "the requirement that a charitable organization register and obtain a certificate before selling a book or magazine applies whether or not the organization makes rep-

resentations as to the use of the proceeds of the sale." (*Id.*)

Clearwater points out that the plain language of the provision refutes Scientology's statements. Further, Clearwater contends that Scientology misrepresents the Galbraith deposition testimony (Galbraith dep., pp. 88-92) as to the sale of literature.

Clearwater also contends that the provision does not censor content of the literature and is not a prior restraint. Clearwater also reiterates the protection built in to the ordinance itself: the ordinance provides an exemption from the financial reporting requirement if the charitable organization collected $10,000 or less from no more than twenty people during the preceding twelve months; the ordinance provides judicial review of any denial of a Certificate of Registrations; and the ordinance provides that organizations can continue soliciting until a court denies a Certificate of Registration.

The Court examined the Galbraith deposition and finds that the deposition testimony does not support Scientology's claim. (Galbraith dep., pp. 88-92). The Court also compared the definition of "soliciting funds" in the Clearwater ordinance with a similar provision in the Houston ordinance. Houston ordinance Section 37-41 reads:

> (a) The term "solicit funds" or "solicitation of funds" shall mean any request for the donation of money, property, or any thing of value, or the pledge of a future donation of money, property, or anything of value; or the selling or offering for sale of any property, real or person, tangible or intangible whether of value or not, including but not limited to, goods, books, pamphlets, tickets, publications, or brochures, upon the representation, express or implied, that the proceeds of such sale will be used for a charitable purpose as such term is herein defined. Expressly

> excluded from the meaning of "solicit funds" or "solicitation of funds" is any offer of membership in any organization. A solicitation of funds is complete when the solicitation is communicated to any individual located within the corporate limits of the city.

The Fifth Circuit Court of Appeals found that the Houston ordinance, including this provision was constitutional. This Court does not find that the Clearwater provision differs significantly from the Houston provision. Throughout all its Memoranda, Scientology has relied on the Houston ordinance. The Court relies on the Houston ordinance in this instance. The Court finds Scientology's arguments unconvincing and denies summary judgment to Scientology on this issue. Accordingly, it is

ORDERED that Plaintiff CHURCH OF SCIENTOLOGY FLAG SERVICE ORG. INC's motion for partial summary judgment against Defendants, CITY OF CLEARWATER, et al. on the issue of standing is granted; it is further

ORDERED that Plaintiff CHURCH OF SCIENTOLOGY FLAG SERVICE ORG. INC's motion for partial summary judgment against Defendants, CITY OF CLEARWATER, et al. on all issues other than standing is denied. It is further

ORDERED that Defendants, CITY OF CLEARWATER, et al.'s motion for partial summary judgment against Plaintiff CHURCH OF SCIENTOLOGY FLAG SERVICE ORG. INC. on the issue of standing is denied;

ORDERED that Defendants, CITY OF CLEARWATER, et al.'s motion for partial summary judgment against Plaintiff CHURCH OF SCIENTOLOGY FLAG SERVICE ORG. INC. on all issues other than standing is granted;

ORDERED that all other pending motions before the Court in this case, as listed above, are denied as moot.

DONE AND ORDERED in Chambers, in Tampa, Florida, this 4th day of Feb., 1990.

/s/ Elizabeth A. Kovachevich
ELIZABETH A. KOVACHEVICH
United States District Judge

PROLOGUE

In 1984, when this Court ruled that Ordinance 3479-84 was facially constitutional, the Court was accepting a burden that would save the parties time and effort by allowing the parties to appeal the Court's ruling immediately. The Court recognized that it was dealing with the concerns of a municipality as expressed through its legislative body, and that the concerns required swift, expeditious attention. This Court's role is merely to interpret the laws made by the elected representatives of the people, who, in making the laws, provide contemporary expression of the public's will as manifested in a city ordinance.

The Court also deferred to the fundamental precept that a statute, when possible, should be upheld as constitutional. The Texas cases of *International Society of Krishna Consciousness of Houston, Inc. v. City of Houston, Texas,* 689 F.2d 541 (5th Cir. 1982) and *Poe v. City of Humble, Texas,* 554 F. Supp. 223 (1983) also influenced the Court's ruling that the Clearwater ordinance was constitutional. The Houston ordinance was initially passed in 1969. The ordinance expressed the will of the people regarding financial disclosure in charitable solicitation situations. It was tested by the Plaintiff in 1979 and the Fifth Circuit upheld the ordinance and the will of the people. The ordinance was again upheld when Poe, a member of a religious society, brought an action challenging the constitutionality of a religious solicitation ordinance in Humble, Texas. The Federal District Judge upheld the constitutionality of the ordinance citing *Hous-*

ton. Likewise, this Court upheld the will of the people in upholding the constitutionality of the Clearwater ordinance.

Since 1984, several important decisions have supported the Clearwater citizens' viewpoint. *See Employment Division, Department of Human Resources of Oregon v. Smith,* 108 L. Ed. 876 (1990); *Riley v. National Federation of The Blind of North Carolina, Inc.,* 487 U.S. 781 (1988); *Hernandez v. Commissioner of Internal Revenue,* 109 S.Ct. 2136, 2141 (1989); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 723 F. Supp. 1467 (S.D. Fla. 1989).

Chief Justice Rehnquist and Justice O'Connor also support, in their dissent from the Court's majority opinion in *Riley,* 487 U.S. 781, the Clearwater viewpoint that not all solicitation is protected first amendment conduct. The Chief Justice said, about charitable contribution first amendment protection:

> The Court' opinion in *Village of Schaumburg* relied on the seminal cases of *Lovell v. Griffin,* 303 U.S. 444 (1938), *Schneider v. State,* 308 U.S. 147 (1939), and *Martin v. Struthers,* 319 U.S. 141 (1943), as establishing the right of charitable solicitors under the First Amendment to be free from burdensome governmental regulation. It is interesting to compare the activities of the three "solicitors" in those cases with the activities of professional fundraisers in cases like the present one. In *Lovell,* for example, appellant was convicted for distributing a religious pamphlet and a magazine called the "Golden Age" without a permit. 303 U.S. at 450. In *Schneider,* the evidence showed that one of the petitioners was a "Jehovah's Witness" who canvassed house-to-house seeking to leave behind some literature and to obtain contributions to defray the cost of printing additional literature for others. 308 U.S. at 158. In *Martin,* the appellant was also a Jehovah's

Witness, who went door-to-door distributing to residents of homes leaflets advertising a religious meeting. 319 U.S. at 142.

These activities are a far cry indeed from the activities of professional solicitors such as those involved in *Munson* and the present case. In *Munson*, the plaintiff, an Indiana corporation, was "a professional for-profit fundraiser in the business of promoting fundraising events and giving advise to customers on how those events should be conducted. Its Maryland customers include[d] various chapters of the Fraternal Order of Police." 467 U.S. at 950. The professional fundraisers in the present case presumably operate in the same manner. Yet the Court obdurately refuses to allow the various States which have legislated in this area to distinguish between the sort of incidental fundraising involved in *Lovell*, *Schneider*, and *Martin* on the one hand, and the entirely commercial activities of people whose job is, simply put, figuring out how to raise money for charities.

The Court has recognized that the commercial aspects of newsgathering and publishing are different from the editorial function, and has upheld regulation of the former against claims based on the First Amendment. . . .

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 91-3988

CHURCH OF SCIENTOLOGY FLAG SERVICE, ORG., INC.,
Plaintiff-Appellant,

versus

CITY OF CLEARWATER, MILTON A. GALBRAITH, JR., City Attorney of the City of Clearwater, CYNTHIA E. GOUDEAU, City Clerk of the City of Clearwater,
Defendants-Appellees.

On Appeal from the United States District Court
for the Middle District of Florida

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING EN BANC

[Filed Dec. 14, 1993]

Before: ANDERSON and DUBINA, Circuit Judges and CLARK, Senior Circuit Judge.

PER CURIAM:

(✓) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Joel F. Dubina
United States Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 91-3988

D.C. Docket No. 84-719-CIV-T-17

CHURCH OF SCIENTOLOGY FLAG SERVICE, ORG., INC.,
Plaintiff-Appellant,

versus

CITY OF CLEARWATER, MILTON A. GALBRAITH, JR., City Attorney of the City of Clearwater, CYNTHIA E. GOUDEAU, City Clerk of the City of Clearwater,
Defendants-Appellees.

On Appeal from the United States District Court
for the Middle District of Florida

Before ANDERSON and DUBINA, Circuit Judges, and CLARK, Senior Circuit Judge.

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the order of the said District Court appealed from in this cause be and the same is hereby AFFIRMED in part, VACATED

in part and REVERSED in part; and that this cause be and the same is hereby REMANDED to said District Court for further proceedings in accordance with the opinion of this Court;

It is further ordered that costs be taxed equally between plaintiff-appellant and defendants-appellees.

Entered: September 30, 1993
For the Court: Miguel J. Cortez
Clerk

By: /s/ Matt Davidson
Deputy Clerk

Issued as Mandate: Feb. 28, 1994

ORDINANCE NO. 3479-84*

AN ORDINANCE OF THE CITY OF CLEARWATER, FLORIDA, AMENDING SECTION 100.01, DEFINITIONS, SECTION 100.02, EXEMPTIONS, SECTION 100.03, REGISTRATION WITH CITY CLERK, SECTION 100.04, MAINTENANCE OF RECORDS, SECTION 100.05, PROHIBITED ACTS, SECTION 100.06, POWER OF THE CITY ATTORNEY TO INVESTIGATE AND PROSECUTE PROHIBITED ACTS OF CHARITABLE ORGANIZATIONS, SECTION 100.07, DAMAGE TO INJURED PERSONS, SECTION 100.08, NOTICE TO THE PUBLIC ABOUT THE PROVISIONS OF THIS CHAPTER, OF CHAPTER 100, SOLICITATION OF FUNDS FOR CHARITABLE PURPOSES, OF TITLE VIII, PUBLIC HEALTH AND SAFETY, OF THE CODE OF ORDINANCES, CITY OF CLEARWATER; TO REVISE AND SHORTEN THE DEFINITION OF THE TERM "CHARITABLE ORGANIZATION"; TO REVISE AND EXPAND THE DEFINITION OF THE TERM "SOLICIT FUNDS" TO INCLUDE A SERIES OF ITEMS WHEREUPON REPRESENTATION OF THE PROCEEDS OF THE SALE OF SUCH ITEMS WILL BE USED FOR THE CHARITABLE PURPOSE; TO REMOVE THE DEFINITION OF THE TERM "MEMBER" AND THE DEFINITION OF THE TERM "NATIONAL ORGANIZATION"; TO REVISE AND SHORTEN THE DEFINITION OF THE TERM "PROFESSIONAL SOLICITOR"; TO REVISE EACH OF THE EXEMPTION CATEGORIES AND REMOVE LANGUAGE RELATING TO FUNDS IN EXCESS OF $10,000; TO REMOVE LANGUAGE RELATING TO THE MAINTENANCE OF RECORDS; TO REMOVE LANGUAGE RELATING TO THE ISSUANCE OF AN ANNOUNCEMENT OR ADVERTISEMENT; TO RE-

[*] Bold material was struck through in original and italicized material was underlined in original.

QUIRE IN THE REGISTRATION STATEMENT AN ESTIMATED PERCENTAGE OF THE TOTAL PROJECTED COLLECTIONS WHICH THE COSTS OF SOLICITATION WILL COMPRISE; TO REQUIRE IN THE REGISTRATION STATEMENT THAT A CHARITABLE ORGANIZATION WILL MAINTAIN THE RECORDS AND DOCUMENTS NECESSARY TO FILE THE REPORTING STATEMENT AND PROVIDE A DESCRIPTION OF THOSE RECORDS AND DOCUMENTS; TO REQUIRE THE FILING OF A DECLARATORY JUDGMENT ACTION WHERE THE CITY CLERK HAS DENIED ISSUANCE OF A CERTIFICATE OF REGISTRATION AND THE CHARITABLE ORGANIZATION DISAGREES WITH SUCH DECISION; TO PERMIT THE CHARITABLE ORGANIZATION TO SOLICIT FUNDS WITHOUT COMPLIANCE WITH THE REGISTRATION PROVISION UNLESS AND UNTIL THE CIRCUIT COURT RULES THAT THE CITY CLERK'S REFUSAL TO ISSUE THE CERTIFICATE WAS PROPER; TO EXPAND THE SCOPE RELATING TO THE FILING BY A CHARITABLE ORGANIZATION OF ANY SIMILAR REGISTRATION STATEMENT FILED IN ANY STATE, CITY OR COUNTY TO PERMIT THE FILING OF THE SAME WITH THE CITY CLERK; TO REWORD THE REPORTING AND DISCLOSURE PROVISION TO CLARIFY WHAT MONEY AND PROPERTY IS TO BE DISCLOSED; TO REQUIRE THAT CHARITABLE ORGANIZATIONS MAINTAIN RECORDS OR DOCUMENTS NECESSARY TO FILE COMPLETE AND TRUTHFUL STATEMENTS REQUIRED BY SECTION 100.03 FOR A PERIOD OF THREE (3) YEARS FROM THE FILING OF EACH STATEMENT AND TO DISPENSE WITH ALL OTHER MAINTENANCE FUNCTIONS; TO DELETE THE POWER OF THE CITY CLERK TO DECLARE A DEFAULT; TO REWORD AND CLARIFY INDIVIDUAL SUBPARAGRAPHS OF THE PROHIBITED

ACTS AND TO ADD NEW PROHIBITED ACT RELATING TO THE WILLFUL FAILURE TO MAINTAIN THE RECORDS OR DOCUMENTS REQUIRED BY SECTION 100.04; TO ADD A NEW PROHIBITED ACT RELATING TO PRIVATE STATEMENTS; TO MAKE THE INVESTIGATION TO BE PERFORMED BY THE CITY ATTORNEY MANDATORY IN CHARACTER; TO GRANT THE CITY ATTORNEY SUBPOENA POWER WITH RESPECT TO THE RECORDS OR DOCUMENTS DESCRIBED IN SECTION 100.04; TO DELETE THE SUBPARAGRAPH RELATING TO THE CITY ATTORNEY'S ACCESS TO PUBLIC RECORDS AS BEING UNNECESSARY IN LIGHT OF CHAPTER 119, FLORIDA STATUTES; TO PERMIT THE CITY ATTORNEY TO PROSECUTE VIOLATIONS OF THE PROHIBITED ACTS WHERE PROBABLE CAUSE EXISTS; TO PERMIT A CHARITABLE ORGANIZATION TO EXCLUDE SOLICITATION INFORMATION RELATING TO MEMBERS FROM ITS REGISTRATION STATEMENT WHERE A PRIVATE STATEMENT IS MAINTAINED; AND TO CHANGE INDIVIDUAL WORDS AND PUNCTUATION FOR SENSE AND CLARITY; PROVIDING FOR THE REPEAL OF ALL ORDINANCES IN CONFLICT HEREWITH TO THE EXTENT OF SUCH CONFLICT; PROVIDING FOR THE SEPARABILITY OF THE PROVISIONS HEREOF; PROVIDING FOR AN EMERGENCY PURSUANT TO SECTION 166.041, FLORIDA STATUTES; DECLARING THAT THE CITY OF CLEARWATER IS EXEMPT FROM PINELLAS COUNTY ORDINANCE 82-38; DECLARING THAT A PUBLIC EMERGENCY EXISTS AFFECTING THE WELFARE OF THE CITIZENS OF THE CITY OF CLEARWATER; AND PROVIDING FOR THE EFFECTIVE DATE OF THIS ORDINANCE.

WHEREAS, the City of Clearwater, Florida, is presently involved in litigation directed toward the validity

of Chapter 100 of the Clearwater Code of Ordinances; and

WHEREAS, Fifth Circuit Judge Wisdom, in similar litigation involving the City of Houston, Texas, commended the City for further narrowing its ordinance during the pendency of that litigation; and

WHEREAS, it would further serve the purposes for which Chapter 100 was created to narrow and refine the scope of each provision and thereby preserve the integrity of that chapter and the public purposes it serves; and

WHEREAS, just like the City of Houston, it is felt that further refining and narrowing should be accomplished prior to the conclusion of the litigation mentioned herein; and

WHEREAS, an emergency exists within the City of Clearwater in that it is immediately necessary that the scope and wording of Chapter 100 of Clearwater Code of Ordinances be further narrowed and refined by addressing each and every narrowing type question that could be raised prior to the termination of the litigation mentioned herein, thereby preserving and enhancing the public purpose for the ordinance and the welfare of the citizens of the City of Clearwater.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COMMISSION OF THE CITY OF CLEARWATER, FLORIDA;

Section 1. That Section 100.01, Definitions, of Chapter 100, Solicitation of Funds for Charitable Purposes, of Title VIII, Public Health and Safety, of the Code of Ordinances, City of Clearwater, be and the same is hereby amended and renumbered or relettered where necessary to read as follows:

Section 100.01. Definitions.

As used in this chapter,

(1) The term "charitable organization" shall mean an organization or person which is or holds itself

out to be a benevolent, educational, voluntary health, philanthropic, humane, religious or eleemosynary organization that solicits *funds* **or obtains contributions solicited from the public** for charitable purposes. **A branch, area, chapter, office or similar affiliate or any person soliciting contributions within the City of Clearwater for a charitable organization that has its principal place of business outside the City shall be a charitable organization for the purposes of this chapter.**

(2) The term "solicit funds" or "solicitation of funds" shall mean any request, within the City of Clearwater, for the donation of money, property, or anything of value, or the pledge of a future donation of money, property, or anything of value; or the selling or offering for sale of any property, real or personal, tangible or intangible, whether of value or not, *including, but not limited to, goods, books, pamphlets, tickets, publications or subscriptions to publications, or brochures, upon the representation, express or implied, that the proceeds of such sale will be used for a charitable purpose as such term is herein defined.* Expressly excluded from the meaning of "solicit funds" or "solicitation of funds" is any offer of membership in any charitable organization. A solicitation of funds is complete when the solicitation is communicated to any individual then located within the corporate limits of the City.

(3) The term "charitable purpose" shall mean benevolent, philanthropic, educational, religious, humane, voluntary health, or other non-profit objectives, including the benefit of poor, needy, sick, refugee or handicapped persons; the benefit of any church or religious society, sect, group, or order; the benefit of any fraternal, social or civil organization, or the benefit of any educational institution. The term "charitable purpose" shall not be construed

to include the direct benefit of the individual making the solicitation. The term "charitable purpose" shall not be construed to include the benefit of any political group or political organization that is subject to financial disclosure under state or federal law.

(4) The term "individual" shall mean only a natural person.

(5) The term "member" shall mean any person regularly attending or participating in a charitable organization.

(6) The term "national organization" means that part of a charitable organization that coordinates, supervises, or exercises control over policy, fund raising, or expenditures, or assists or advises one or more chapters, branches, areas, offices, or affiliates in the City.

(7 *5*) The term "professional solicitor" means **any person who, for a financial or other consideration, solicits contributions for, or on behalf of, a charitable organization whether such solicitation is performed personally or through agents, servants, or employees specifically employed by or for a charitable organization, who are engaged in the solicitation of contributions under the direction of such person; however, no agent, servant, or employee of a professional solicitor shall be deemed to be a professional solicitor. A bona fide salaried officer or employee of a charitable organization maintaining a permanent establishment within the state shall not be deemed to be a professional solicitor. No attorney, registered investment counselor, CPA or accountant, or banker who advises any person to make a contribution to a charitable organization shall be deemed, as a result of such advice, to be a professional solicitor** *any person who is compensated for his or her or its solicitation of funds for charitable purposes in any manner whatsoever that is based on*

or related to the amount of money or property collected as a result of his or her or its solicitation of funds.

Section 2. That Section 100.02, Exemptions, of Chapter 100, Solicitation of Funds for Charitable Purposes, of Title VIII, Public Health and Safety, of the Code of Ordinances, City of Clearwater, be and the same is hereby amended and renumbered or relettered where necessary to read as follows:

Section 100.02. Exemptions.

(1) Notwithstanding the foregoing, a charitable organization *that does not employ a professional solicitor to solicit funds* shall be exempt from the provisions **of this chapter** *of Sections 100.03 and 100.04; (a)* if it **does** *did* not **receive contributions** *collect money or property* from more than 20 persons *as a resutl of the solicitation of funds during the preceding twelve (12) months;* **or** *(b) if* all of its functions, including fund raising activities, *within the City of Clearwater,* are carried on by persons who are unpaid for their services; or *(c)* if no part of the *charitable* organization's assets or income inures to the benefit of or is paid to any officer or member; **or if the solicitation is in the form of a donation or collection that occurred within the membership of the charitable organization; or** *(d)* if the charitable organization **does not raise or receive contributions from the public** *did not collect money or property as a result of the solicitation of funds* in excess of $10,000 during **its annual reporting period** *the preceding twelve (12) months.* **Nevertheless, if the contributions raised from the public are in excess of $10,000 for said annual reporting period, the charitable organization shall, within 88 days after the date it shall have received total contributions in excess of $10,000, register subject to the provision of this chapter. Any such exempt charitable organ-**

ization shall lose such exemption when it employs a professional solicitor. Nevertheless, such organization shall maintain such records as necessary to prove that the organization qualifies for such exemption.

(2) Every scholarship fund that solicits and raises funds solely for the purpose of providing scholarships shall be exempt from the registration provisions provided for in this chapter if all of the fund's functions, including fund raising activities, are carried on by persons who are unpaid for their services and if no part of the organization's assets or income inures to the benefit of, or is paid to, any officer or member.

(3) The issuance of any announcement or advertisement that such solicitation as described in subsection (2) above will occur or which announces or advertises an event at which unannounced solicitation as described in subsection (2) above occurs shall be exempt from the registration provisions of this chapter.

(3) If a charitable organization does not want to disclose publicly the information required by the statements described in Section 100.03 regarding the solicitation of funds from members of the charitable organization, it may exclude this information from the statements required by Section 100.03 if:

(a) it indicates on the statements required by Section 100.03 that information about solicitation of funds from members of the charitable organization has been excluded, and

(b) it prepares a private statement at least annually that contains all of the information required by the statements described in Section 100.03 for the solicitation of funds from members of the charitable organization that is not reported in the statements required by Section 100.03, which is signed under

oath by the individual described in subparagraph 1(o) of Section 100.03, and

(c) it maintains the records and documents that are necessary to complete this private statement for a period of three years from the date of each statement, and together with the private statement, makes them reasonably available for inspection by every member of the charitable organization.

Section 3. That Section 100.03, Registration with City Clerk, of Chapter 100, Solicitation of Funds for Charitable Purposes, of Title VIII, Public Health and Safety, of the Code of Ordinances, City of Clearwater, be and the same is hereby amended and renumbered or relettered where necessary to read as follows:

Section 100.03. Registration with City Clerk

1. All charitable organizations soliciting funds **or desiring to solicit funds** for a charitable purpose in the City of Clearwater **shall maintain records, documents and information and** shall file a registration statement on forms provided by the City Clerk on or before January 31st of each year. At the time of filing such registration statement, the charitable organization shall pay a registration fee of $10.00. The forms shall contain the following information:

(a) The name of the person registering and desiring to solicit funds for charitable purposes.

(b) Whether the person registering is a natural person, partnership, corporation, or association and,

(i) if a natural person, the business or residence address and telephone number must be given.

(ii) if a partnership, the names of all partners and the principal business address and telephone number of each partner must be given.

(iii) if a corporation, the person registering must state whether it is organized under the laws of Florida or is a foreign corporation, and must show the mailing address, business location, telephone number, name of individual in charge of soliciting funds in Clearwater of such corporation, and the names of all officers and directors or trustees of said corporation, and, if a foreign corporation, the place of incorporation and registration date and certificate to operate in Florida as a foreign corporation.

(iv) if an association, the registration statement shall show the association's principal business address and telephone number, if any, and shall show names and principal business or residence addresses and telephone numbers of the officers and directors or trustees of the association. If the association is part of a multi-state organization or association, the mailing address and business location of its central office shall be given, in addition to the mailing address and business location of its local office.

(c) A reference to all determinations of tax-exempt status under the Internal Revenue Code of the United States and law of any state, and the laws of any county or municipality.

(d) A brief description of the charitable organization registering, the charitable purpose for which the funds are to be solicited, and a brief explanation of the intended use of the funds toward that purpose.

(e) The names, mailing address and telephone number of all individuals authorized to disburse the proceeds of the solicitation.

(f) The names, mailing address and telephone number of all individuals who will be in direct charge or control of the solicitation of funds.

(g) The time period within which the solicitation of funds is to be made, giving the date of the beginning of solicitation and its projected conclusion.

(h) A brief description of the methods and means by which the solicitation of funds is to be accomplished.

(i) An estimated schedule of salaries, wages, fees, commissions, expenses and costs to be expended and paid in connection with the solicitation of funds and in connection with their disbursement, *and an estimated percentage of the total projected collections which the costs of solicitation will comprise.*

(j) The names of any other cities in Florida in which the person registering has **solicited** *collected* funds for charitable purposes within the past five (5) years, but in **no** *the* event that the person registering has **solicited** *collected* funds for charitable purposes in more than five (5) other cities in Florida, the person registering may list the five (5) cities in Florida in which the most recent **solicitations** *collections* occurred.

(k) A statement to the effect that if a Certificate of Registration is granted, such Certificate will not be used as or represented to be an endorsement by the City or any of its officers or employees.

(l) A statement to the effect that the charitable organization will maintain records or documents that are necesasry to file the complete statement required by subparagraph 8 of this section and a brief description of those records or documents.

(l *m*) The names of any officer, director, trustee, partner, or any current agent or employee engaging in solicitation of funds who has been convicted of a felony or a misdemeanor involving moral turpitude within the past seven (7) years, the nature of the

offense, the State in which the conviction occurred, and the year of such conviction.

(**m** *n*) A brief explanation of the reasons, if the person registering is unable to provide any of the foregoing information, why such information is not available.

(**n** *o*) The registration statement must be signed by the applicant, if the person registering is an individual; if the person registering is a partnership, by the partner charged with disbursing funds solicited; if a person registering is a corporation or an association, by its officer charged with disbursing funds solicited. The individual signing the registration statement shall sign the statement and swear before an officer authorized to administer oaths that he or she has carefully read the registration statement and that all the information contained therein is true and correct.

2. After a review of the registration statement to determine its compliance with this section, and within ten (10) working days of the receipt of the registration statement, the City Clerk shall either issue a Certificate of Registration, as provided in this section, or notify the person registering that the registration statement does not comply with the requirements of this section and specifically point out what information or explanation has not been furnished that is required before a Certificate of Registration will be issued.

3. If for any reason the City Clerk refuses to issue a Certificate of Registration to any charitable organization *that has filed a registration statement and the charitable organization disagrees with this decision*, the City of Clearwater shall bear the burden of initiating, within ten working days of the denial, *a* judicial **review** proceedings in a court of competent **jurisdiction to review the City Clerk's**

administrative decision *in the form of a declaratory judgment action pursuant to Chapter 86, Florida Statutes, to review the City Clerk's refusal to grant a registration certificate.* In any such proceeding, the charitable organization *seeking the Certificate of Registration* shall be considered a party in interest, and shall have the absolute right to receive a set of **all review papers, to appear by its own counsel, and to submit any and all documents and papers in opposition to the denial of a Certificate of Registration, and shall have the further right to appeal or to join in any appeal from a final adverse judgment or order. The City shall bear the burden of demonstrating in the administrative review that a compelling and substantial governmental interest exists on the record justifying the denial of the Certificate of Registration in the specific instance.** *Unless or until the circuit court rules that the City Clerk has properly refused to issue a Certificate of Registration, the charitable organization may solicit funds without compliance with the registration provisions of this chapter.*

4. In such judicial review proceedings, a charitable organization may also raise the question to the court that furnishing a specific item or items of information or explanations under this **section** *chapter* constitutes a special or unique hardship to the *charitable* organization, and the court shall have jurisdiction in such review process, upon concluding that disclosure constitutes a unique or special hardship, to dispense with the furnishing of that information or explanation, so that a Certificate of Registration can be issued.

5. The City Clerk shall prescribe the form of the Certificate of Registration. However, each such Certificate of Registration shall be printed in black except that the following shall be printed prominently thereon in red: "The issuance of this Certificate of

Registration is not an endorsement by the City of Clearwater or any of its officers or employees". Nor may the Certificate of Registration be used by any charitable organization for promotion purposes. Each Certificate of Registration shall bear a registration number that is the same as the file containing the registration statement filed by the registrant.

6. Any charitable organization as defined in Section 100.01(1) that has filed a registration statement with **the State of Florida, Pinellas County, or any other municipality or county located in Florida** *any state, city or county* during the preceding twelve (12) months containing substantially the same information *under oath* as requested in this section and has been issued a registration certificate, may file a copy of such registration statement and registration certificate with the City Clerk and such charitable organization shall be deemed to have complied with the requirements of Section 100.03 relating to the preparation and filing of a registration statement as long as such prior filing and registration certificate remains valid.

7. All registration statements filed with the City Clerk, whether or not a Certificate of Registration has been issued, shall be a public record and shall be available for inspection by members of the public during regular business hours and copies may be obtained at the regular cost.

8. Within 80 days from the expiration of the Certificate of Registration, the charitable organization shall file with the City Clerk on forms provided by that office a statement regarding all solicitation of funds for the prior year, which statement shall be sworn by an appropriate officer of the charitable organization and which sworn statement shall show the following: (a) the full amount of **funds and/or other property received from the public** *money and*

property collected as a result of the solicitation of funds during the **previous year** *annual reporting period;* (b) a complete list of any and all expenses incurred in procuring **the said** *those* funds. The **said** list shall be broken down into salaries, wages, fees, commissions, advertising and all other expenses and costs paid in connection with *the* solicitations *of those funds;* (c) the bank, if any, where the proceeds of **the said** *those* solicitations *of funds* were placed; and (d) actual or proposed utilization in approximate amounts of the said proceeds.

Section 4. That Section 100.04, Maintenance of Records, of Chapter 100, Solicitation of Funds for Charitable Purposes, of Title VIII, Public Health and Safety, of the Code of Ordinances, City of Clearwater, be and the same is hereby amended and renumbered or relettered where necessary to read as follows:

Section 100.04. Maintenance of Records.

1. No *C*haritable organization*s* shall **fail to** maintain records or documents that are necessary to file *the* complete and truthful **registration** statements under **this chapter** *required by Section 100.03 for a period of three (3) years from the filing of each statement.* **Records and documents in this paragraph refer to the information mandated by Section 100.03 and shall be maintained by the charitable organization for a period of three (3) years from registration. A charitable organization, upon the request of the City Attorney in connection with an investigation into possible violations of this chapter, may not refuse to produce information required in the registration statement.**

Any charitable organization that is exempt from the provisions of this chapter pursuant to Section 100.02(1) shall not be required to maintain any records or other documents relating to such exemption for more than six (6) months from the date that it

solicits or obtains contributions solicited from the public for charitable purposes.

2. If the City Clerk determines that any organization subject to this chapter has failed to maintain documents or records containing information sufficient for the purposes of filing a registration statement, he or she shall notify such organization in writing and specify what information it has failed to maintain. If any such organization fails for thirty (30) working days after receipt of notice to provide sufficient evidence of the maintenance of such records and documents without legal excuse, the City Clerk shall declare a default, and such default shall constitute sufficient grounds for the City Attorney to seek and obtain judicial enforcement of this chapter's provisions in a court of competent jurisdiction.

Section 5. That Section 100.05, Prohibited Acts, of Chapter 100, Solicitation of Funds for Charitable Purposes, of Title VIII, Public Health and Safety, of the Code of Ordinances, City of Clearwater, be and the same is hereby amended and renumbered or relettered where necessary to read as follows:

Section 100.05. Prohibited Acts.

No charitable organization subject to the provisions of this chapter, or no agent, employee, or officer of any such organization, shall engage in any of the following prohibited acts:

1. (a) willful use of any solicited funds or soliciting or retaining funds to support or execute any conduct that is criminal or illegal under the laws of the City of Clearwater, Pinellas County, the State of Florida, or the United States;

(b) wilful failure to file a **registration** *any* statement **pursuant** to *required by* this chapter or knowingly making false statements or providing false information **with respect to any information or docu-**

ments provided under the registration requirements of this chapter *in those statements;*

(c) use of any scheme or artifice to defraud or obtain money or property by means of any false statement or representation;

(d) **falsely** *wilfully* concealing the identity of an organization on whose behalf solicitations are being made;

(e) **falsely representing** *knowingly misrepresenting* that any **contributions** *the proceeds of any solicitation of funds,* under current law, would entitle the donor to a Federal or State income tax deduction;

(f) **falsely** promising any person that a **contribution** *the proceeds of a solicitation of funds* will be refunded upon request, and thereafter *willfully* failing within 60 days to make a refund that has been requested in writing and **within a reasonable period of time;**

(g) promising any person that refunds of **contributions** *the proceeds of any solicitation of funds* will be made upon request without providing such person, at the time such representation is made, with a written statement of the terms and conditions upon which refunds are made; provided, however, that any statement made in good faith at the time is not prohibited by this section.

(h) soliciting *funds* at private residences between 11:00 P.M. and 6:00 A.M.;

(i) solicitation *of funds* by any person on behalf of a charitable organization which has failed to register *obtain a Certificate of Registration* under this chapter and is not exempt under Section 100.02;

(j) wilful failure to **file the records with the City Clerk under this chapter** *maintain the records or documents required by Section 100.04.*

(k) if claiming an exemption under Section 100.02 (3), wilful failure to maintain the records or documents required to be maintained by said Section, wilful failure to make the private statement and those records or documents reasonably available for inspection by every member of the charitable organization, or knowingly making false statements or providing false information in the private statement or those records or documents described in said Section.

2. In addition to any other remedy provided by law, any person who wilfully and knowingly commits any of the prohibited acts under this section shall be punishable by a fine not to exceed one thousand dollars ($1,000.00) or a term of incarceration not to exceed six (6) months, or both.

3. This chapter is not intended to repeal or affect other fraud and consumer protection laws of the City of Clearwater, Pinellas County, the State of Florida, or the United States.

Section 6. That Section 100.06, Power of the City Attorney to Investigate and Prosecute Prohibited Acts of Charitable Organizations, of Chapter 100, Solicitation of Funds for Charitable Purposes, of Title VIII, Public Health and Safety, of the Code of Ordinances, City of Clearwater, be and the same is hereby amended and renumbered or reletterd where necessary to read as follows:

Section 100.06. Power of the City Attorney to Investigate and Prosecute Prohibited Acts of Charitable Organizations.

1. The City Attorney **may** *shall* investigate **the solicitation of funds by charitable organizations** *alleged violations of this chapter* only after ten individuals file separate bona fide complaints in writing, sworn to, or affirmed, with the City Attorney, setting forth facts demonstrating that one or more

of the prohibited acts set forth in Section 100.05 have been engaged in by the charitable organization and that the complaining party has been injured by such act or acts.

2. **For purposes of investigating complaints under this section, the City Attorney shall have the power to apply to a court of competent jurisdiction for a subpoena or subpoena duces tecum to bring before him or her any person and to require as part of such subpoena the production of relevant documents and records and to administer oaths and take depositions of any such person so subpoenaed. The City Attorney shall have the power to effect service of process of subpoenas, after approval of such subponea by a court of competent jurisdiction. The wilful failure of a person without lawful excuse to obey a subpoena or subpoena duces tecum shall constitute a prohibited act under this chapter. This provision does not preempt or supersede any other general laws concerning a refusal to obey a valid subponea.** *The City Attorney, when conducting an investigation pursuant to subparagraph 1 shall have the power to subpoena any person, require the production of the records or documents described in Section 100.04 and the private statement and records or documents described in Section 100.02(3), and administer oaths.*

3. In investigating citizen complaints about a charitable organization's solicitation of funds, the City Attorney shall have access to the public records filed by the organization with the City Clerk.

4 *3.* **The City Attorney may commence and maintain in a court of competent jurisdiction all proper and necessary actions and proceedings to prosecute any act prohibited by this chapter.** *If the investigation conducted under subparagraph 1 demonstrates that probable cause exists to believe that*

a violation or violations under Section 100.05 exist, then the City Attorney shall institute an action to prosecute such violation or violations.

Section 7. That Section 100.07, Damages to Injured Persons, of Chapter 100, Solicitation of Funds for Charitable Purposes, of Title VIII, Public Health and Safety, of the Code of Ordinances, City of Clearwater, be and the same is hereby amended and renumbered or relettered where necessary to read as follows:

Section 100.07. Damages to Injured Persons.

1. Nothing herein contained shall preclude any person aggrieved by a prohibited act under Section 100.05 **performed** *committed* by a charitable organization from commencing an appropriate action or proceeding **in the Circuit Court** under the laws of the State of Florida to recover compensatory damages.

Section 8. That Section 100.08, Notice to the Public About the Provisions of this Chapter, of Chapter 100, Solicitation of Funds for Charitable Purposes, of Title VIII, Public Health and Safety, of the Code of Ordinances, City of Clearwater, be and the same is hereby amended and renumbered or relettered where necessary to read as follows:

Section 100.08. Notice to the Public About the Provisions of this Chapter.

The City Attorney shall be empowered to inform the public about the requirements of this chapter as applied to all charitable organizations soliciting funds in Clearwater, Florida. The City Attorney specifically has the authority to notify the public that the office is authorized to receive and investigate complaints relating to the violations of this chapter. The City Attorney shall give public notice of all convictions of *charitable* organizations violating the provisions of this chapter and the basis of these convictions.

Section 9. All ordinances or parts of ordinances in conflict herewith are hereby repealed.

Section 10. Should any part or provision of this ordinance be declared by a court of competent jurisdiction to be invalid, the same shall not effect the validity of the ordinance as a whole, or any part thereof, other than the part declared to be invalid.

Section 11. This ordinance is adopted as an emergency ordinance, pursuant to Section 166.041(3)(b), Florida Statutes, and the Clearwater City Charter.

Section 12. The City of Clearwater hereby exempts itself from the provisions of Pinellas County Ordinance No. 82-38, and such ordinance shall not apply within the corporate limits of the City of Clearwater, Florida.

Section 13. It is hereby found, determined and declared that this ordinance is necessary and urgently needed for the preservation of the welfare of the citizens and inhabitants of the City of Clearwater, Florida, in that passage of this ordinance is needed to further narrow and refine the provisions of Chapter 100 of the Clearwater Code of Ordinances, which chapter is presently the subject of pending litigation and should therefore be addressed prior to the termination of such proceedings before the trial court, thereby preserving the existing public and compelling interest which calls for the creation of the chapter, and by reason of such fact, an emergency is hereby declared; and this ordinance shall be in full force and effect immediately upon its passage. This ordinance shall automatically expire ninety (90) days from the date of its passage unless the ordinance is submitted during such time for consideration as a non-emergency ordinance.

PASSED ON FIRST FIRST READING March 15, 1984

PASSED ON SECOND AND FINAL READING AND ADOPTED AS AMENDED March 15, 1984

/s/ Kathleen F. Kelly
Mayor-Commissioner

Attest:

/s/ Lucille Williams
City Clerk

[Excerpts From Clearwater's Brief In The Eleventh Circuit]

The North Carolina law is illustrative. In North Carolina a registrant must provide, among other things, the name and address of any branches which will share in the charitable contributions; any determination of tax-exempt status under the Internal Revenue Code; the names, addresses and occupations of officers, directors, trustees, persons directly in charge of the fundraising activities, and custodians of financial records and contributions; whether any such person has been convicted of a felony; a detailed financial statement including a balance sheet, kinds and amounts of funds raised, costs and expenses, allocation or disbursement of funds raised, changes in fund balances, and an accountant's opinion as to the fairness of the presentation of financial information; whether the registrant is authorized by another governmental entity to solicit contributions and whether any officer or professional solicitor has ever been enjoined from soliciting contributions anywhere; the location of financial records; the methods of solicitation, including a narrative description of the promotional plan together with advertising material prepared for public distribution; the terms of arrangements with professional solicitors for salaries, commissions or other remuneration; the time period and geographic area in which the solicitations will be made; the proposed use of the contributions; and the total amount of funds proposed to be raised. N.C. Gen. Stat. 131 C-7. In *Riley*, the Supreme Court approved North Carolina's disclosure requirements. *Riley*; *supra*, 101 L.Ed. 2d at 688.

The Illinois Solicitation Act of 1963 was involved in the *Village of Schaumburg* case, *supra*, in which the Supreme Court spoke approvingly of disclosure laws. The Illinois act requires that organizations register before conducting charitable solicitation by filing the following information with the Division of Charitable Trusts and Solicitations: the name of the organization; the names and addresses of the officers, directors, trustees, and chief

executive officer; the addresses of the organization; where and when the organization was legally established, the form of its organization and its tax exempt status; the purpose for which the organization was founded and the purposes for which contributions will be used; whether the organization is authorized to solicit by any other governmental authority, and whether it has ever been enjoined by any court; names and addresses of professional fundraisers who act on behalf of the organization; methods by which solicitation will be made; copies of contracts between the organization and professional fundraisers; and the board or individual in whose discretion contribution income is distributed.

Also, registered organizations must file with the Division an annual financial report. The report must include a balance sheet and statement of income and expense, "clearly setting forth the following":

> gross receipts and gross income from all sources, broken down into total receipts and income from each separate solicitation; cost of programs designed to inform or educate the public; funds or properties transferred out of this State, with explanation as to receipt and purpose; total net amount disbursed or dedicated for each major purpose, charitable or otherwise. R5-108, Exhibit 18, at 30.

The Los Angeles ordinance upheld in *Gospel Army, supra,* required a filing that "must contain, among other things, information regarding the purpose, character, method, and estimated expenses of the solicitation [showing salaries and other items of expense], the need for the contribution to be solicited, the proposed use of the solicited funds, the amount that will remain available for charitable purposes over expenses, the amount received from solicitations in the preceding calendar year, the expenses of such solicitations [including individual salaries or other items of compensation], and the amount that remained available for charitable purposes. *Gospel Army*, 163 P.2d at 708 n.1.

No. 93-1604

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

CITY OF CLEARWATER, FLORIDA, *et al.*,

Petitioners,

—v.—

CHURCH OF SCIENTOLOGY FLAG SERVICE ORGANIZATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Date: July 11, 1994

50pp

RULE 29.1 STATEMENT

Respondent Church of Scientology Flag Service Organization, Inc. has no parent companies or subsidiaries to list pursuant to Rule 29.1 of the Rules of the Supreme Court.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Church of Scientology Flag Service Organization (the "Church") files this brief in opposition to the petition for writ of certiorari. As set forth herein, the opinion below was consistent with the decisions of this Court, and, contrary to the suggestions of the City, does not conflict with the decisions of the Fifth Circuit or any other circuit. Moreover, the court of appeals reversed the district court's order granting summary judgment to the defendant City on the plaintiff Church's claim of discriminatory purpose, on the ground that the record revealed controverted issues of material fact. The court of appeals remanded the case for trial on that issue. Thus, certiorari is particularly inappropriate in the present interlocutory context of this case, in the absence of a full record after trial.

OPINIONS BELOW

Petitioners fail to mention or append the judgment of the district court, dated February 4, 1991, granting the Church's motion for partial summary judgment on the issue of standing, denying the Church's motion for partial summary judgment on other issues, denying the City's motion for partial summary judgment on the issue of standing, and granting the City's motion for partial summary judgment on other issues (A-1 to A-2).[1] On September 16, 1991, the district court issued an order (A-3 to A-4) denying the Church's motion for new trial and/or to alter or amend judgment, except that the clerk was directed to amend the judgment to grant the City's motion for summary judgment on all issues, except standing. An amended judgment was issued on September 17, 1991 (A-5).

STATEMENT OF THE CASE

The petition fails to present a coherent or accurate account of the facts or the proceedings below. The petition should be denied on that ground alone. S. Ct. R. 14.5. In any event, it therefore is necessary for respondent to set forth these matters

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[1] References to "A__" are to pages in the appendix to this Brief. References to "__a" are to pages in the appendix to the petition itself.

in greater detail than might ordinarily be required in a brief in opposition. *See* S. Ct. R. 15.1.

Statement of Facts

Respondent is a church of the Scientology religion that provides religious training and counseling in Clearwater, Florida. R1-18-2.[2] The Internal Revenue Service has recognized the respondent as a church, within the meaning of 26 U.S.C. § 170(c), exempt from taxation under 26 U.S.C. § 501(c)(3). *See* Internal Revenue Service, *Cumulative List of Organizations Described in Section 170(c) of the Internal Revenue Code of 1986*, Publication 78 (rev. 2-94), Supp. No. 1994-1.[3] Its religious activities are directed toward its members. R1-18-2. The Church solicits contributions from members at its facilities in Clearwater, usually in the course of offering its religious services. R5-110-Tab 3 at 9. Such solicitations are

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[2] Record references are made to the record in the court of appeals as follows: "R[volume]–[document number]–[page]" unless otherwise noted. Where the document in the record is indexed by tabs or volumes, the tab or volume is referred to prior to the page.

[3] To divert attention from the ordinance's extraordinary intrusion into internal church affairs, the City scurrilously alleges "a panoply of crimes and bad acts by and questionable policies of Scientology." Pet. at 5. The fact is that no federal, state or local crimes have ever even been charged against the Church or its officers, directors, or managing agents; the City has not alleged that they have. While it is true that over thirteen years ago certain officials of a different Scientology church were convicted for actions against the IRS in the mid-1970s, those officials long ago were removed from all positions of authority. Even the IRS has been satisfied that this is true, because it recently affirmatively recognized all Scientology churches, including respondent, as tax–exempt under 26 U.S.C. § 501(c)(3), *i.e.*, that the churches are operated in a manner consistent with public policy. *BNA Daily Tax Reporter*, No. 196 at K-1 to K-5 (Oct. 13, 1993). In any event, as discussed in the text, *post*, the ordinance does nothing to prevent or punish the kinds of acts the City describes.

The City's reference to alleged Church "policies," Pet. at 5, is similarly incorrect. The undisputed record below shows that the purported "make money" policy that the City quotes in tabloid style is merely "a description of the function and job of the person in charge of fundraising for the church." R5-114-3. There are no "policies" authorizing the kind of vindictive actions set forth by the City (Pet. at 5 n.2). R5-114-3, 4, 5.

typically made without representations as to the intended use of the money contributed; the contributions are used to support the general programs and operations of the Church. *Id.*

This case raises questions of the constitutionality of Clearwater Ordinance No. 3479-84 (143a-164a). The ordinance succeeds a prior ordinance, No. 3091-83, enacted in 1983, which is the subject of the Petition and Brief in Opposition in No. 93-1603, petition pending. The ordinance is directed toward the "solicitation" of funds by "charitable organizations," a term that encompasses groups that are or hold themselves out to be "benevolent, educational, voluntary health, philanthropic, humane, religious or eleemosynary" in nature. Section 100.01(1) (146a-147a). The term "solicitation of funds" is broadly defined to include not only all requests within the City "for the donation of money, property, or anything of value," but also the selling or offering for sale of any property, explicitly including books, pamphlets and brochures, "upon the representation, express or *implied*, that the proceeds of such sale will be used for a charitable purpose." Section 100.01(2) (147a) (emphasis added).

The ordinance requires all charitable organizations wishing to solicit funds to file a registration statement and obtain a certificate of registration from the City Clerk. Section 100.03(1) (151a). The registration statement calls for extensive information concerning the collection *and disbursement* of funds by the organization, including "an explanation of the intended use of the funds," Section 100.03(1)(d) (152a), a schedule of costs to be expended not only in the solicitation process itself, but also "in connection with their disbursement," Section 100.03(1)(i) (153a), and the names, addresses, and telephone numbers of all persons responsible for the disbursement. Section 100.03(1)(e) (152a). The registration statement is a public document. Section 100.03(7) (156a).

At the end of the annual period covered by the registration statement, the organization must file a public closing statement detailing the amount of funds solicited, all expenses incurred, and the actual or proposed use of the proceeds. Section 100.03(8) (156a-157a). Charitable organizations must maintain records and documents necessary for the filing of the registration and closing statements for a period of three years. Sec-

tion 100.04 (157a-158a). Thus, to the extent a charitable organization, *including* a church, solicits funds to carry out its general programs or operations (in contrast to a specific charitable purpose such as relief to victims of a flood or earthquake), it is required to provide detailed information concerning its overall budget and program of operations.

The ordinance also sets forth "Prohibited Acts," violation of which are punishable by a $1,000 fine or incarceration of up to six months. Section 100.05(1)-(2) (158a-160a). The City Attorney, upon receipt of ten "bona fide" complaints, must investigate alleged violations and issue subpoenas without court order. Section 100.06(1) (160a-161a). The City Attorney not only can inquire into the truth of information on the registration statement, Section 100.05(1)(b) (158a-159a), he also may investigate the "use of any scheme or artifice to defraud or obtain money or property by means of any false statement or representation." Section 100.05(1)(c) (159a). This authority has been construed by the City Attorney as permitting him to investigate whether promises of benefits from participation in religious services are fraudulent. R5-110-Tab 2, Ex. B. at 40-42.

Most critically, the ordinance regulates *all* solicitations by charitable organizations of their own members, on their own premises. Thus, even churches are required to submit to City officials detailed records concerning funds donated by members for the general purposes of the church, including a full accounting of all expenditures made from such funds. Sections 100.03, 100.04 (151a-158a). City officials may investigate such expenditures, require disclosure of all relevant church records, and bring prosecutions for failure to comply with provisions of the ordinance. Section 100.06 (160a-162a).

The ordinance provides an alternative to submission of registration and closing statements with respect to funds donated by members. Under Section 100.02(3) (151a), an organization may elect to exclude information regarding such funds from its public registration statement provided that it makes the same information available to all members in a "private statement." In addition, the organization *must* make available to its members "the records and documents that are necessary to complete this private statement for a period of three years . . ." Section 100.02(3)(c) (151a). Thus, the ordinance requires that churches

make their books and records available to every member upon demand, subject to potential criminal penalty.

Members or factions who are dissatisfied with their church's compliance with the private statement or the requirement as to open books and records may invoke the aid of the City Attorney to compel compliance. Sections 100.06(1), 100.05(b) (160a-161a, 158a-159a). The City Attorney is authorized to investigate organizations, including by the use of compulsory process, to determine whether they have provided full and accurate disclosure to their members. Section 100.06(2) (161a). And documents and records subpoenaed, including the private statement, become public records. Thus, by means of the enforcement process, these so-called private statements will ultimately become public documents as well.

Finally, the ordinance requires that churches that provide refunds for donations or purchases establish a written refund policy. Section 100.05(f)-(g) (159a). The ordinance requires that this statement be distributed at the time the policy is announced, even during a church service. R5-110-Tab 2, Ex. B 43-45. Moreover, the ordinance requires that refunds be made within sixty days of the request. Section 100.05(f) (159a).

Proceedings Below

The Church filed this lawsuit in March 1984, alleging that the ordinance was unconstitutional for a variety of reasons, including, *inter alia,* that (1) it was enacted with a discriminatory animus against the Church and the Scientology religion; (2) it unlawfully sought to regulate fundraising by churches from their own members and on their own premises; (3) it unlawfully caused excessive governmental intrusion into matters of ecclesiastical governance, administration, and finances; (4) it unconstitutionally imposed a licensing system for the sale or distribution of religious literature; and (5) it unlawfully vested broad discretion in the officials charged with its enforcement, without sufficient standards to govern its exercise. The complaint sought declaratory and injunctive relief.[4]

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[4] A coalition of religious groups, including the National Council of Churches of Christ in the U.S.A., the American Baptist Church, the American Jewish Committee, the Suncoast American Baptist Church, and

On July 13, 1984, after oral argument, the district court held that the ordinance was facially valid, stating no reasons for its conclusion, and certified the question of facial validity for appeal (A-6 to A-9). On August 17, 1984, the court of appeals granted the Church's application for permission to appeal the questions certified. A different panel vacated the prior panel's grant of leave to appeal, finding that the Church's facial challenge to the statute was not ripe for review. *Church of Scientology Flag Serv. Org.* v. *City of Clearwater*, 777 F.2d 598, 608 (11th Cir. 1985), *cert. denied*, 476 U.S. 1116 (1986).

Upon remand, the parties conducted discovery[5] and filed cross-motions for summary judgment. The district court granted the Church's motion for partial summary judgment that Scientology is a religion and that the Church has standing to raise its claims under the First Amendment religion clauses. In all other respects it rejected the Church's challenge to the ordinance. The district court granted the City's motion for summary judgment on all other issues, and dismissed the complaint. The

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Americans United for Separation of Church and State, also sued to challenge the constitutionality of the ordinance. That case remains pending in the district court, presumably awaiting final determination of this case. *Americans United for Separation of Church and State, et al.* v. *City of Clearwater*, No. 84-699- Civ.-T-17 (M.D. Fla.).

[5] In their petition in *this* case (Pet. at 11, Part D), petitioners attempt to incorporate a discussion about the discovery in *this* case that they improperly have placed in their petition in No. 93-1603 (Pet. in No. 93-1603, at 10-12, Part F). They also have included as an "appendix" to this petition two pages from their brief below (165a-166a). These blatant attempts to circumvent this Court's page limitation, S. Ct. R. 33.3(a), along with the other rule violations and unprofessionalism of the petitions, are reason enough to deny them. S. Ct. R. 14.5.

In any event, in the "incorporated" argument from the petition in No. 93-1603, petitioners suggest that the Church imposed meritless objections to the City's bloated discovery requests and improperly sought to extend this litigation. These allegations are false. When the Church objected to the City's 101 separate categories of document requests on the ground that they were grossly overboard and burdensome, the Magistrate Judge warned that if the City chose to file a motion to compel, he would impose a $50 fine for each unfounded request and each unfounded objection. R46-119-2. At that point, the City, obviously recognizing that discretion was the better part of valor, refrained from filing any motion to compel.

district court did not address the Church's claim that the City enacted the ordinance for a discriminatory sectarian purpose, to encourage or force the Church to leave town.

The court of appeals reversed the district court's judgment in major respects, remanding for further proceedings and trial on the Church's sectarian purpose claim. Applying well-established case law from this Court, the court of appeals held that if the predominant purpose of the ordinance was "to convey a message of endorsement or disapproval of religion," *Lynch* v. *Donnelly*, 465 U.S. 668, 691 (1984) (O'Connor, J., concurring), or, to put it slightly otherwise, if the challenged law "was born of animus to religion in general or Scientology in particular," *Hernandez* v. *Commissioner of Internal Revenue*, 490 U.S. 680, 696 (1989), then it violated the Establishment Clause. The court of appeals then reviewed the evidence presented to the district court by both sides with respect to the City's motion for summary judgment, in the light most favorable to the Church as the non-moving party, and found that a trier of fact could conclude "that the city commission conducted its legislative process from beginning to end with the intention of singling out Scientology for burdensome regulation. The record shows a widespread political movement, apparently driven by an upsurge of sectarian fervor, intent on driving Scientology from Clearwater" (27a). The court of appeals concluded that the evidence presented by the Church "precludes judgment as a matter of law for the City" (35a). It vacated the judgment and remanded for further proceedings, including trial. *Id.*

The court of appeals also held key provisions of the ordinance unconstitutional, as applied to churches. The court turned its greatest attention to the provisions requiring churches to publicly disclose detailed financial information about how they used every dollar raised from virtually any source, including donations made by church members on church premises. Under the ordinance, a church could not solicit funds from its own membership at its own services without first obtaining a license from the city and without agreeing to make widespread disclosure of its intended and actual use of the funds raised. The court of appeals found these provisions to constitute improper and excessive regulation of and entanglement with internal

ecclesiastical matters (38a, 39a).[6] The City's petition for rehearing and suggestion of rehearing en banc was denied (140a).

REASONS FOR DENYING THE PETITION

I. REVIEW OF THE ELEVENTH CIRCUIT'S INTERLOCUTORY ORDER IS INAPPROPRIATE BECAUSE DETERMINATION OF THE FACTUAL QUESTION WHETHER THE CITY ENACTED THE ORDINANCE WITH DISCRIMINATORY MOTIVE MAY PROVE DISPOSITIVE OF THIS LITIGATION

The petition should be denied because it asks the Court to review a case that is in an interlocutory posture. In reversing the district court's decision granting summary judgment to the City, the Eleventh Circuit remanded the case for a factual inquiry into whether the City enacted the ordinance with an impermissible sectarian or religiously discriminatory purpose: to burden the Church and drive it from Clearwater. If trial reveals that the City enacted the ordinance for an improper purpose, the ordinance must fall on that ground alone. Review now is thus both unnecessary and premature; a determination that the City adopted the ordinance with an improper motive would obviate any need for further examination of the various legal questions the City purports to raise in its petition.

A. Resolution Of The Church's Establishment Clause Challenge Requires A Factual Determination Whether The Ordinance Was Enacted For An Improper Discriminatory Purpose

As the court of appeals recognized, throughout this litigation the Church has "vigorously argued" that the City enacted the

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[6] The court also struck down a provision mandating that if a church maintains a policy to refund donations under certain circumstances, it must do so within sixty days of a request. "The statute has the principal effect of mandating a church policy . . . The provision advances the City's illegitimate goal of dictating to churches what the [refund] policy shall be, simultaneously imposing its own enforcement mechanisms in support of the mandated policy" (69a–70a).

ordinance with the specific aim of substantially harassing and burdening the Church (26a), and displayed a preference for more "main-line" denominations by adapting the ordinance to accommodate their concerns, while refusing to consult with the Church over the legislation (28a-33a). In granting summary judgment to the City, the district court did not even mention this claim, let alone discuss the relevant evidence.

The court of appeals reversed and remanded for a full factual determination of the purpose behind the ordinance, applying well-established rules governing a claim that legislation was enacted with an improper religious motive in violation of the Establishment Clause. When legislation is attacked on Establishment Clause grounds, a court must first examine whether the law facially differentiates among religions. *Hernandez*, 490 U.S. at 695. If the legislation, like the ordinance at issue here, does not facially discriminate against or favor a particular religion, a court will then apply the three-pronged inquiry set forth in *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971); *see Hernandez*, 490 U.S. at 695, as did the Eleventh Circuit in this case.

The court of appeals correctly noted (18a) that the initial question under *Lemon* is whether the legislation has a "secular legislative purpose." *Lemon*, 403 U.S. at 612. Only if legislation has a secular purpose will a court examine, under the second and third prongs of *Lemon*, whether the legislation's primary effect is one that advances or inhibits religion, and whether the legislation promotes "excessive government entanglement with religion." *Id.* at 612-13 (citations omitted). The Church's claim that the ordinance was born of improper discriminatory motives thus implicates the first prong of *Lemon*, which focuses on "the purpose that animated adoption" of the law. *Edwards* v. *Aguillard*, 482 U.S. 578, 585 (1987).

If it is found that a law was enacted for an impermissible purpose, no inquiry into the second or third prong of *Lemon* is necessary; the law must fall on that ground alone. *Lynch*, 465 U.S. at 690 (O'Connor, J., concurring); *see also Wallace* v. *Jaffree*, 472 U.S. 38, 56 (1985). The factual question whether the ordinance "was born of animus to religion in general or Scientology in particular," *Hernandez*, 490 U.S. at 696, is thus both a threshold issue and potentially dispositive.

Although it attempts to argue that the court of appeals improperly applied the law on the question of discriminatory purpose, the City has cited no case in which legislation was upheld despite a determination that it was enacted with a religiously-based discriminatory purpose. Its failure to do so is not surprising; this Court has consistently stated that legislation enacted with the governmental purpose of either endorsing or disapproving of religion cannot survive scrutiny under the Establishment Clause. *See, e.g., Lynch*, 465 U.S. at 690 (O'Connor, J., concurring); *Wallace* v. *Jaffree*, 472 U.S. at 56. Thus, the court of appeals' simple application of these precedents raises no important or novel question of law, and there is no reason for this Court to review this case now before a complete record has been developed on the City's purpose in enacting the ordinance. Logic and concern for the orderly progression of litigation require that the case be remanded for a decision on this potentially determinative issue.

B. The Court Of Appeals Correctly Ruled That Conflicting Evidence Precluded The Grant Of Summary Judgment On The Question Of The City's Motive In Enacting The Ordinance

The City argues that the court of appeals wrongly interpreted the facts in finding that the record precluded summary judgment on the question of discriminatory purpose. Pet. at 12-13. This contention unquestionably does not afford a reason for this Court to review the case. The court of appeals applied the appropriate standard of review, correctly stating that "summary judgment may be granted only if no genuine dispute remains as to any material fact" (17a), *see* Fed. R. Civ. P. 56(c), and that the evidence must be "[c]onstrued in the light most favorable to the non-moving party" (27a); *see Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 157 (1970). Applying this standard, the court was unable to rule out the existence of a genuine dispute as to a material fact (35a).

Despite the district court's non-treatment of this question, the court of appeals recognized that significant evidence suggests that the City did in fact act with invidious purpose in adopting the ordinance. "The record shows a widespread

political movement, apparently driven by an upsurge of sectarian fervor, intent on driving Scientology from Clearwater" (27a). Its detailed discussion of the evidence (27a-35a) confirms that it was correct in reversing the grant of summary judgment.

The court noted that the City had retained Michael Flynn, a Boston lawyer who has dedicated much of his career to litigating against the Church, to coordinate the hearings that led to adoption of the ordinances. Neither Flynn nor the City Commissioners made any secret that the proposed ordinance was directed at the Church; indeed, the local press referred to it as the "anti-Scientology" ordinance. R1-18-9, 10 and Vol. 2, Ex. M, Vol. 3, Ex. Q at 3, Ex. R, Vol 4, Ex. DD. During his election campaign, City Commissioner James Calderbank declared: "I will explore every avenue and support every legal means of encouraging the Scientologists to leave" (31a). A later newspaper article reported Calderbank as saying, "Scientology 'has to be treated like a cancer—first you arrest its growth, then remove it from the city . . . or nullify its existence.' " *Id.* Another candidate for a Commissioner's position was reported to say that "Scientologists lie, steal and cheat" and to believe that "the community must work to destroy the organization at the top" (32a). The then-mayor of Clearwater likewise characterized the Church as a "dark cloud that is upon us" (31a), and referred to "an organized effort of the City of Clearwater" in connection with the Scientologists (32a). When asked whether the City intended to hold hearings on any other organization, the mayor responded, "I don't know of anyone else that is claiming to be a religion that is not" (33a).

These comments by City officials are themselves sufficient to preclude holding as a matter of law that the City did not enact the ordinance with anti-Church animus. The court of appeals, however, also examined other evidence of improper purpose. For example, Flynn advised the City that the ordinance would allow it to collect data in support of its position that the Church is not a bona fide religion entitled to exemption from property taxes (28a). More tellingly, evidence revealed that the City hoped also to deprive the Church of its privilege to pay the lower non-profit bulk postage rates, and to interfere with the Church's state and federal income tax exemptions. *Id.*

These objectives, which are not legitimate concerns of a city government, may certainly be viewed as evidence of the City's desire to discriminate against the Church (28a-29a).

Evidence also showed that a number of changes were made in the 1983 ordinance at the request of "more popular denominations" (30a). For example, the City attempted to develop a definition of "membership" that, when combined with a membership exemption from the ordinance's reporting requirements, would exempt members of other churches, but not the Church. R1-18-27, Vol. 4, Ex. EEE at 4. (This provision was the subject of litigation concerning the 1983 ordinance. *See* No. 93-1603, pet. pending.) As another example, the Church is perhaps unique among religious organizations in that it permits members to obtain a limited refund of sums donated. This refund policy is intimately connected with the Church's ecclesiastical doctrines, and requests for refunds are considered in light of those doctrines. Consequently, the City's effort to regulate such refunds was obviously directed at the Church's unique policy and provides significant evidence that the City carefully constructed the ordinance to affect most strongly the Church, rather than other eleemosynary organizations.

The City's heated discussion of whether the court of appeals engaged in some kind of "transmutation of concern over crime into allegedly antireligious feelings," Pet. at 12, overlooks the obvious fact that the court of appeals did not make any ultimate determination on the City's motivation in adopting the ordinance. The court decided only that there was sufficient evidence to suggest that a trial might reveal that the City enacted the ordinance "with the intention of singling out Scientology for burdensome regulation" (27a), and consequently that summary judgment was inappropriate (35a).

The City's major objection appears to be that "[t]he panel had been informed that deposition testimony showed uniformly that Clearwater was concerned only with crimes and bad acts." Pet. at 12. Of course, the City can point to no authority for the proposition that self-serving deposition testimony of its own officials (for which it provides no record citations) is controlling over all other evidence. The City also protests that the court of appeals' observations "may have condemned Clearwater to future defeat at trial upon remand." Pet. at 13. This

extravagant claim is ludicrous. No ultimate factual determination has yet been made whether the City acted with impermissible motive, or, if so, whether it would nevertheless have enacted the ordinance, and this determination can be made only after a full factual development in the district court. At base, the City's argument is simply a lament over the existence of conflicting evidence on the issue of improper motive. This only confirms that the court of appeals ruled correctly that summary judgment was inappropriate on this issue, and that the conflicting evidence should be weighed properly at a full trial.

II. THE ELEVENTH CIRCUIT'S DECISION IS CONSISTENT WITH THE DECISIONS OF OTHER CIRCUITS AND OF THIS COURT

The City repeatedly asserts that certiorari is necessary to resolve a purported conflict between the decision of the Eleventh Circuit in this case and the decision of the Fifth Circuit in *International Soc'y for Krishna Consciousness of Houston, Inc. ("ISKCON")* v. *City of Houston*, 689 F.2d 541 (5th Cir. Unit A 1982), as well as the rulings of other courts of appeals and this Court. According to the City, if the Eleventh Circuit's rulings are allowed to stand, they will throw into question numerous other disclosure laws. Pet. at 2.

Petitioners have attempted to manufacture a conflict where none exists. As shown below, the Eleventh Circuit's decision is entirely consistent with the Fifth Circuit's decision in *ISKCON* v. *City of Houston*, with numerous other rulings of courts of appeals, and with decisions of this Court.

What petitioners fail to acknowledge is that the ordinance at issue in this case is unique. In no other jurisdiction has a government entity sought to regulate solicitations by churches for general church purposes or solicitations by churches of their own members on church premises. Only in Clearwater, Florida, and nowhere else, has a government entity attempted to require that a minister file a registration statement prior to passing the plate at a Sunday service or to mandate statements accounting for every dollar collected from the faithful.

Thus, petitioners' repeated statements that the ordinance is "similar or identical to hundreds, or thousands, of state, county

and city disclosure laws all over the country," Pet. at 2, is false. A survey of state and local solicitation laws demonstrates that they all exempt either solicitation conducted by religious organizations, at least for general church or religious purposes, or membership solicitations.[7] The typical charitable solicitation law is directed at non-religious organizations raising money for a single or a variety of specific charitable purposes, such as flood or famine relief, medical research, or aid to the poor. And even laws of that kind have been subject to searching First Amendment scrutiny and review. *See Riley* v. *National Fed'n of the Blind*, 487 U.S. 781 (1988); *Village of Schaumburg* v. *Citizens for a Better Env't*, 444 U.S. 620 (1980); and *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940). No court has ever upheld a law requiring detailed disclosure of a church's overall budget, its program of operations, and its solicitations of its own members on its own premises.

Indeed, it was precisely these aspects of the ordinance—its requirements of extensive disclosure of a church's program of

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[7] Petitioners list a number of registration and disclosure laws, which they contend are similar, if not identical, to the Clearwater ordinance. *See* Pet. at 7 & n. 3. However, in so doing, they ignore the sections of those laws that establish the exemptions described above. The following sections of the laws petitioners cite exempt from their coverage membership solicitations: Ark. Code Ann. § 4-28-408(a); Ga. Code Ann. §§ 43-17-9(a)(3),-9(d); Haw. Rev. Stat. § 467 B-11(6); Ill. Rev. Stat. § 5103(b)(2); Me. Rev. Stat. Ann. tit. 9, § 5006(1)(A); Md. Code Ann. § 6-102(c)(1)(ii)(3); Mich. Comp. Laws Ann. § 400.283(c); Minn. Stat. Ann. § 309.515(d); N.J. Stat. Ann. § 45:17A-5(b)(2); N.Y. Exec. Law § 172-a(2)(b); Ohio Rev. Code Ann. § 1716.03(D); Okla. Stat. Ann. tit. 18, § 552.4(3); Pa. Stat. Ann. tit. 10, § 162.7(a)(2) (only short form required); R.I. Gen. Laws § 5-53-3(6); Va. Code Ann. § 57-60(a)(4); W. Va. Code § 29-19-6(4).

These sections broadly exempt religious organizations: Ark. Code Ann. § 4-28-408(a); Conn. Gen. Stat. Ann. § 21a-190(d); Ga. Code Ann. 43-17-2(2); Haw. Rev. Stat. § 467 B-11(1); Ill. Rev. Stat. § 5103(a); Me. Rev. Stat. Ann. tit. 9, § 5003(1); Md. Code Ann. § 6-102(c)(1)(ii)(2); Mass. Gen. Laws Ann. Ch. 67, § 20; Mich. Comp. Laws Ann. § 400.272(a); Minn. Stat. Ann. § 309.515(b); N.J. Stat. Ann. § 45:17A-5(a); N.Y. Exec. Law § 172–a(1); N.C. Gen. Stat. § 131C-5(a); N.D. Cent. Code § 50-22-01(1); Ohio Rev. Code Ann. § 1716.03(A); Okla. Stat. Ann. tit. 18, § 552.4(1); Pa. Stat. Ann. tit. 10, § 162.3; R.I. Gen. Laws § 5-53-3(2); Va. Code Ann. § 57–48(2)(i); W. Va. Code § 29-19-6(5).

operations and its solicitation of its members—that were critical to the Eleventh Circuit's determination that key provisions of the Clearwater ordinance violated the Establishment Clause and failed to meet the exacting scrutiny required under the First Amendment. Moreover, the Eleventh Circuit's ruling was grounded on and entirely consistent with well-established law both in the courts of appeals and this Court. No basis exists, therefore, for this Court to grant review of the decision.

A. The Eleventh Circuit's Opinion Does Not Conflict With The Fifth Circuit's Decision In *ISKCON* v. *City of Houston*

The City contends that the ordinance is identical to an ordinance enacted by the City of Houston that required charitable organizations, including churches, to register and disclose information as a condition to solicitation of the public in public places and whose constitutionality was challenged in *ISKCON* v. *City of Houston*. According to the City, because the Eleventh Circuit struck down the Clearwater ordinance, while the Fifth Circuit upheld the Houston ordinance, the two decisions conflict. A close examination of the two decisions, however, reveals that not only are the two ordinances not identical, but the two decisions are entirely consistent. Indeed, the reasoning of the Fifth Circuit required the rejection of certain provisions of the Clearwater ordinance as unconstitutional.

Petitioners are correct that the Eleventh Circuit noted that the information requested by the Clearwater ordinance is "virtually identical" to the disclosure required under the Houston ordinance. However, petitioners fail to disclose that in the *very same sentence* the court stated that despite this superficial similarity, "there are significant differences between the Clearwater and Houston laws" (7a). The court then engaged in a lengthy and detailed analysis of those differences.

First, the Eleventh Circuit noted that, unlike the Houston ordinance, the Clearwater disclosure form must be filed "even if the organization intends to solicit only from its own members" (8a). The Houston ordinance, in contrast, contained a broad exemption for membership solicitations and solicitations on an organization's premises. *See ISKCON* v. *City of Houston*, 689 F.2d at 544. Second, although both the Houston and Clear-

water ordinances required the filing of a retrospective reporting statement at the end of each annual registration period, Clearwater's provisions for retrospective disclosure "differ[ed] from the Houston ordinance" in that they were far more extensive and far-reaching (9a). Not only did the Clearwater ordinance require detailed disclosure of the expenses incurred in the solicitation of funds and of every proposed or actual use of the funds, but it required disclosure of the bank account in which the funds were located, applied to membership solicitations, and imposed criminal penalties for failure to comply. Third, the court noted that the Clearwater ordinance defined a number of other criminal offenses in connection with its disclosure requirements, whereas "[n]o such criminal provisions were included in the Houston ordinance" (10a).

Finally, the Eleventh Circuit found that the Clearwater ordinance conferred far broader executive discretion than the Houston ordinance with respect to enforcement of the ordinance, and that the Houston ordinance provided a means by which churches could avoid unwanted state entanglement in their affairs. Under the Houston ordinance, an organization could choose to omit information from the registration statement so long as it furnished an explanation for the omission. *See* 689 F.2d at 547. As the Eleventh Circuit recognized, Houston had adopted an interpretation of its ordinance "giving the administering official no discretion to evaluate the adequacy of information provided by registrants" (11a). Indeed, as Houston emphasized in its brief to the Fifth Circuit, the enforcing official had "no power to review the information for accuracy nor to judge the sufficiency of any explanation offered [as to why information was not included.]" R5-113-Exhibit A. Houston further suggested that the only basis to deny a certificate would be if the applicant were to file a wholly or partially "blank registration form" and that the only function of the official reviewing the form would be "to determine whether or not it has been filled out." *Id.* The Fifth Circuit adopted this interpretation of the law as controlling. *ISKCON* v. *City of Houston*, 689 F.2d at 547. In contrast, the Eleventh Circuit found that the City of Clearwater explicitly refused to limit the discretion of city officials in these respects. The Clearwater city clerk had the power

to determine whether a registration form met the ordinance's requirements and to deny registration if it were determined that it did not. This power included the ability to "determine whether the stated purpose of the solicitation was in fact a charitable one" as well as to require a "specific explanation of how the funds will be used to further the purposes stated" (10a-11a). In addition, the Clearwater ordinance contained no express guidance with respect to these matters. *Id.*

Moreover, it was precisely these differences between the ordinances that compelled the Eleventh Circuit to conclude that certain provisions of the Clearwater ordinance fostered excessive government entanglement with religion in violation of the Establishment Clause. Essential to the Fifth Circuit's upholding of the Houston ordinance was its exemption for organizations that solicit from their own members. Houston had emphasized in its brief that "the failure to grant such [a membership] exemption would unduly interfere with the practice of religion in violation of the First Amendment." R5-113-Exhibit A. The Fifth Circuit echoed this argument, noting: "All that is mandated is disclosure to the public about those funds which are solicited from the public." *ISKCON* v. *City of Houston*, 689 F.2d. at 556. Critical for the court was that the "internal operations of the organization, apart from its public solicitation, remain under the veil of privacy." *Id.*

Also critical to the Fifth Circuit's decision was the removal from the Houston law, by amendment, of the city's broad investigatory and prosecutorial powers, a change that substantially mitigated the possibility of enduring government surveillance of and entanglement with churches. *Id.* at 543, 546-47. The court placed particular emphasis on the fact that the ordinance did not permit the city to deny a solicitation certificate simply because of an organization's decision not to supply certain information or because of the intended use of the funds raised. Because of the limited discretionary function of the enforcing official, if a church believed that to provide certain information would result in excessive entanglement with its affairs, it could simply say so, and this explanation would have to be accepted. (Houston did not believe that this rendered its ordinance meaningless because potential public donors would at least know that the church declined to provide the information in question,

and could act accordingly.) In contrast, in finding certain provisions of the Clearwater ordinance unconstitutional, the Eleventh Circuit placed particular emphasis on the city's broad investigatory, prosecutorial, and discretionary powers.

For example, the Eleventh Circuit found that unlike routine administrative and recordkeeping regulations narrowly drawn to specific regulatory objectives, the "detailed monitoring and close administrative interaction" imposed by the Clearwater ordinance involved the executive and judicial authorities in every aspect of the church's activities (38a). Not only did it make them "the ultimate arbiters of the appropriate level of disclosure to the church's members in all matters of ecclesiastical fiscal administration" but it also conferred "responsibility for apprising themselves and the public concerning such matters." *Id.* According to the court, this "detailed" and "close" surveillance violated the command of the Establishment Clause that " '[n]either a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*.' " *Id.* (quoting *Everson* v. *Board of Educ.*, 330 U.S. 1, 16 (1947)).

The court of appeals further found that Clearwater's alternative private statement procedures applicable to member solicitations also triggered excessive entanglement because they subjected churches to the continuous surveillance of their members (with the ultimate threat of City intervention, investigation and prosecution) by requiring disclosure of all records underlying the statements upon request (39a). Not only did the City not possess the power to require a church to make such detailed information available to its members, but in trying to accomplish this objective, the City "impermissibly imposed its own preferences concerning the degree of disclosure to members concerning daily operations." *Id.* Such conduct directly violated the principle of the Establishment Clause that "civil authorities must abstain from interposing themselves in matters of church organization and governance" (41a).

Finally, the Eleventh Circuit determined that the regulatory regime imposed by the Clearwater ordinance was "doubly offensive" because of its imposition of criminal enforcement mechanisms (44a). The investigatory and prosecutorial powers conferred by the ordinance "underscore[d] the already sub-

stantial risk of government participation in intramural church conflict and decisionmaking" and thus further fostered an excessive government entanglement. *Id.* As noted above, the Houston ordinance contained no such provisions.

Thus, contrary to petitioners' suggestion, the Eleventh Circuit's decision is entirely consistent with the Fifth Circuit's. The Eleventh Circuit's ruling was based precisely on those aspects of the Clearwater ordinance that distinguished and differentiated it from the Houston law. Indeed, in this respect, it is also significant that the Eleventh Circuit did not determine that the entire ordinance was unconstitutional. Rather, it upheld certain provisions whose disclosure requirements standing alone would in operation and effect be similar to the requirements imposed by the Houston ordinance (45a).

B. The Eleventh Circuit's Decision Is Entirely Consistent With This Court's Ruling In *Jimmy Swaggart Ministries*

The City also suggests that the Eleventh Circuit's decision conflicts with *Jimmy Swaggart Ministries* v. *Board of Equalization*, 493 U.S. 378 (1990), where this Court held that the imposition of a generally applicable sales and use tax did not violate the Establishment Clause. The City's argument appears to be that the Eleventh Circuit failed to take into account the purported ease of complying with the ordinance when it found that it fostered an excessive government entanglement with religion. *See* Pet. at 23. The City suggests that this factor was critical to the Court's upholding of the regulation challenged in *Swaggart*. This argument, however, serves only to demonstrate petitioners' profound misunderstanding of both the decision in *Swaggart* and the court of appeals' decision in this case.

In *Swaggart*—indeed, in the same section of the opinion from which the City quotes, *see* Pet. at 21—the Court specifically held that the administrative and recordkeeping burdens imposed by a regulation are, in and of themselves, of limited consequence in determining whether such a regulation violates the Establishment Clause. 493 U.S. at 394-95. Rather, the critical issues are whether the statutory scheme results in " 'official and continuing surveillance' " of the organization's day-to-day operations or whether the imposition of the tax

requires the state to inquire into the religious motive, content, or purpose underlying the transaction. *Id.* at 395-96 (citation omitted). In *Swaggart*, the Court found that the tax law required "neither the involvement of state employees in, nor on-site continuing inspection of, [the church's] day-to-day operations" and that the state's only concern was whether there was a sale or use. *Id.* The Court therefore held that there was no excessive entanglement resulting from the imposition of the tax.

In contrast, the Eleventh Circuit, after exhaustively reviewing the scope and effect of the Clearwater ordinance, found that it was " 'significantly more intrusive into religious affairs' " than any other "solicitation" regulation previously reviewed by the courts, including the law challenged in *Swaggart* (38a) (citation omitted). Indeed, the Eleventh Circuit explicitly distinguished the statutory scheme in *Swaggart* and that imposed by the ordinance. Whereas the tax imposed in *Swaggart* was "narrowly drawn to specific regulatory objectives" (37a), and did not "enmesh the government in religious affairs," 493 U.S. at 699, the court of appeals found that Clearwater's extensive disclosure requirements and its program of "detailed monitoring and close administrative interaction" would draw the government deeply into "every aspect of the church's activities" (38a). Moreover, it would subject the church to "the continuous surveillance" not only of the government but of its own members (39a). Finally, because Clearwater's disclosure provisions were coupled with broad investigatory and prosecutorial powers, the City would be required to inquire into the religious motive for the church's activities and the propriety of particular expenditures (10a-12a, 44a).

The Eleventh Circuit's conclusion that the Clearwater ordinance fostered an impermissible and excessive government entanglement with religion was thus entirely consistent with *Swaggart*. Indeed, the reasoning and principles set forth in *Swaggart* compelled this conclusion. In sharp contrast to the "narrowly drawn" regulatory scheme in *Swaggart*, which limited the contact between church and state, the ordinance established a regulatory scheme that invited and required intrusive entanglement, thereby rendering it unconstitutional.

C. The City Has Articulated No Important Or Novel Legal Question For This Court's Review With Respect To The Eleventh Circuit's First Amendment Analysis

The City claims that the Eleventh Circuit "refused to credit Clearwater's crucial interest in protecting its populace against fraud and bad acts and refused to credit the usefulness of disclosure in furthering that interest." Pet. at 18. Contrary to the City's assertion, the Eleventh Circuit specifically held that the City has a "compelling interest in preventing affirmative fraud" by a religious organization upon church members and the public (60a). However, after extensive analysis, the court concluded that this interest was "not precisely furthered by the broad disclosures compelled" by the ordinance (58a), and that the ordinance was not sufficiently narrowly tailored to serve the City's interest (63a). As such, the ordinance failed to meet the strict scrutiny required under the First Amendment.

Critical to the court's analysis was that the ordinance's disclosure and reporting requirements were not simply aimed at preventing affirmative fraud, such as a false representation by a "stranger" that money solicited will go to a particular charity. *See, e.g., Cantwell* v. *Connecticut*, 310 U.S. 296, 306 (1940). The ordinance also required a church to disclose to government authorities, the public, and its members on a continuing basis all of its activities and expenditures with respect to all funds raised for its general purposes, even when the funds were raised from its own members and on its own premises. However, based on this Court's precedents, the Eleventh Circuit found that the state has no legitimate interest in requiring a church to disclose either to members or to public contributors how funds solicited for general church purposes will be used. Indeed, the Eleventh Circuit correctly determined that the First Amendment precludes the state from forcing a religious organization to make such information available.

As the court of appeals noted, it is well-established that " '[a]ll who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it' " (56a) (quoting *Watson* v. *Jones*, 80 U.S. (13 Wall.) 666, 728 (1872)). Based on this principle, the court concluded that

the City could not "substitute its own judgment as to the desirable level of disclosure to church members" (57a). This is precisely what the ordinance accomplished. By requiring a church to disclose to members on a continuing basis how it chooses to use funds solicited for general church purposes, the ordinance dictated to religious organizations how they should govern themselves and imposed a freedom of information act upon a church and its members.

Similarly, with respect to disclosure of information to the public, the Eleventh Circuit held, relying on this Court's precedents, that the state "may not compel specific disclosures merely because, in its view, some potential contributors to some causes might tend to think that those facts evidence unfairness or some other objectionable quality in the use to which funds will be put" (57a-58a). Instead, before donating to a religious organization, a non-member may demand any information desired and " 'if the solicitor refuses to give the requested information, the potential donor may (and probably would) refuse to donate' " (58a) (quoting *Riley*, 487 U.S. at 799). The state, however, may not require that such information be provided. To do so would "burden a great deal of protected expression without serving any legitimate purpose" (59a).

Thus, while recognizing the state's compelling interest in preventing religious organizations from fraudulently representing how they will use solicited funds, the Eleventh Circuit correctly determined, in conformity with a host of other court decisions, that the ordinance was not sufficiently tailored to achieve this interest. *See, e.g., NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490, 502 (1979) (warning that "the very process of inquiry" into internal church activities "may impinge on rights guaranteed by the Religion Clauses"); *Surinach* v. *Pesquera de Busquets*, 604 F.2d 73 (1st Cir. 1979) (to same effect, specifically with respect to ongoing financial disclosure by churches); *Fernandes* v. *Limmer*, 465 F. Supp. 493, 504 (N.D. Tex. 1979) ("No church . . . should be compelled to . . . explain the source and use of each dollar without a showing of compelling need achievable by no adequate alternative," and finding no such need in the context of solicitation activity), *aff'd in part, reversed in (other) part*, 663 F.2d 619, 631 (5th Cir. 1981) (finding First Amendment bar "to a complete finan-

cial audit" of churches under guise of solicitation ordinance); *Taylor* v. *City of Knoxville*, 566 F. Supp. 925, 932 (E.D. Tenn. 1982) (same); *Sylte* v. *Metropolitan Gov't*, 493 F. Supp. 313, 319 (M.D. Tenn. 1980) (same).

Indeed, petitioners have been able to point to no other "disclosure" statute or ordinance that has required churches to make such continuing and public disclosures of their budgets and activities, let alone of funds raised from their own members, nor to any court opinion upholding such a law. Furthermore, the City's reliance on *Village of Schaumburg* v. *Citizens for a Better Env't*, 444 U.S. 620 (1980), and *Secretary of State of Maryland* v. *Munson*, 467 U.S. 947 (1984), for the proposition that this Court has approved or sanctioned the use of such "disclosure" statutes is not only wholly misplaced, but it is misleading. First, in neither case was there any attempt to regulate solicitation of members or compel disclosure of such donations or the use of the proceeds. Second, neither case involved attempts to regulate solicitations by churches for general fundraising purposes.[8] Finally, neither case authorized the kind of disclosure plus investigatory and prosecutorial powers that exist in the Clearwater ordinance.[9] Indeed, in both *Schaum-*

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[8] In discussing the use of disclosure laws to prevent fraud, this Court quite clearly contemplated public fundraising appeals by traditional "charities," such as the March of Dimes or the United Way. Indeed, in *Schaumburg*, this Court cited as an example of such a financial disclosure law an Illinois statute regulating solicitations by traditional charities. 444 U.S. at 638 n.12 (citing Ill. Rev. Stat. Ch. 23 § 5102(a) (1977)). The Illinois statute, significantly, exempted religious organizations from the scope of its regulation. Ill. Rev. Stat. at § 5103.

[9] Petitioners' reliance on a number of circuit court cases for the same proposition is similarly misleading. As discussed, *ante*, in *ISKCON* v. *City of Houston*, the court emphasized that no attempt was made to regulate solicitation of members and no disclosure was required except with respect to funds raised from the public. In *International Soc'y for Krishna Consciousness* v. *Barber*, 650 F.2d 430 (2nd Cir. 1981), the court, while recognizing the state's interest in preventing fraud in the solicitation of funds, *invalidated* the ordinance because of a failure to establish that no less restrictive means were available. Finally, in *Gospel Army* v. *Los Angeles*, 27 Cal. 2d 232, 163 P.2d 704 (1945), *appeal dismissed*, 331 U.S. 543 (1947), the solicitation ordinance regulated only secular fundraising activities of religious organizations, exempting solic-

burg and *Munson*, this Court, while recognizing the state's interest in preventing fraud, invalidated solicitation regulations because, as here, they were not sufficiently tailored to serve the state's interest.

For similar reasons, the City's contention that the Eleventh Circuit's decision endangers the ability of the government to protect citizens against other crimes carried out by religious organizations, *see* Pet. at 26-27, is equally frivolous. Nowhere has the City even attempted to demonstrate how the ordinance will accomplish that purpose. Because the ordinance regulates speech, association, and free exercise of religion, the City must " 'convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest.' " *Branzburg* v. *Hayes*, 408 U.S. 665, 700 (1972) (quoting *Gibson* v. *Florida Legislative Investigation Comm'n*, 372 U.S. 539, 546 (1963)).

The ordinance, however, bears no " 'reasonable relationship to the achievement of the governmental purpose asserted as its justification.' " *Id.* (citation omitted). It hardly warrants explanation that a law that purports to regulate charitable solicitations by means of a complex and detailed licensing scheme could not possibly affect such activities as burglaries, electronic bugging, framing of opponents, etc. Moreover, as the Eleventh Circuit recognized, penal laws that directly prohibit acts over which the City has expressed concern already exist. Indeed, not only are these criminal laws more direct and effective in combatting such crimes than an ordinance compelling disclosure of voluntary donations of members to churches, but the penal provisions further the government's interest by means less restrictive of First Amendment rights (62a). Criminal statutes affect only criminal acts and criminals, unlike the ordinance, which interjects City officials into every donation by every church member in the City. Indeed, as this Court stated in *Schaumburg*, it in no way follows that because fraud,

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itations made for evangelical, missionary, or religious purposes. 163 P.2d at 711.

The other cases cited, Pet. at 21, are not relevant. They involve the application of generally applicable laws to religious organizations, not solicitation regulations that implicate First Amendment freedoms.

trespass, and other crimes can be and generally are directly proscribed, charitable solicitation can be unduly restricted: " 'considerations of this sort do not empower a municipality to abridge freedom of speech and press.' " 444 U.S. at 639 (quoting *Schneider* v. *State*, 308 U.S. 147, 164 (1939)).

The City's response to the above proposition once again demonstrates a complete misunderstanding of applicable law. It complains that "*Clearwater cannot enforce the kinds of alternative laws listed by the Circuit*," which present less restrictive means for addressing the City's asserted interests in controlling illegal and coercive conduct of religious organizations, because they are "*state* laws." Pet. at 18 (emphasis in original). This statement is astonishing. It is the duty and function of Clearwater's own police department to enforce state penal laws within the City. *See, e.g.*, Fla. Stat. Ann. § 943.10 (defining the term "law enforcement officer" as a person "employed full time by any municipality . . . whose primary responsibility is the prevention and detection of crime or the enforcement of the penal, criminal, traffic or highway laws of the *state*.") (emphasis added). Clearly, the City's contention that it does not have the power to enforce such laws is absurd.[10]

Finally, the City contends that this Court should review this case because the Eleventh Circuit's decision impairs the government's ability to protect citizens against crime by disabling legislatures from passing anti-crime statutes inspired by the actions of particular criminal organizations. *See* Pet. at 24-25. This argument is without merit. To enact an anti-crime bill that may punish criminals who are incidentally members of a particular religion is obviously quite different than to enact a statute with the primary aim of discriminating against a religion. The unusual circumstances of this case—where legislation was directly aimed at burdening a particular religion—obviously have no bearing on a government's general ability to enact anti-crime legislation.

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[10] In 1989 alone, the Clearwater police made 91 arrests for robbery, 269 for aggravated assault, 327 for burglary, 1,778 for larceny, 2 for kidnapping, and 2 for murder. Florida Dept. of Law Enforcement, *Crime in Florida*, 1989 Annual Report 206. None of the arrests are known to have been of officers, directors, or employees of the Church.

III. THE COURT OF APPEALS APPLIED THE CORRECT LEGAL STANDARDS IN ANALYZING THE CHURCH'S ESTABLISHMENT CLAUSE AND FREE EXERCISE CLAIMS

A. The Court Of Appeals Correctly Applied The Governing Establishment Clause Tests

The City contends that the court of appeals incorrectly failed to apply a compelling state interest test to its analysis of whether the ordinance was enacted for a sectarian purpose and created excessive entanglement between City officials and church entities in violation of the Establishment Clause. This argument is without merit.

The City's reliance on *Larson* v. *Valente*, 456 U.S. 228 (1982), for the proposition that a compelling state interest test should be applied to the Church's Establishment Clause claim conflates two separate issues: whether legislation *facially* discriminates among religions and whether legislation was enacted with an improper motive or creates excessive entanglement. The City wrongly equates the Eleventh Circuit's conclusion that the ordinance is facially neutral with a finding that the City did not intend to discriminate against the Church in enacting the ordinance. *See* Pet. at 15-16.

The court of appeals refused to apply *Larson* because the law here is facially neutral, whereas *Larson* involved an ordinance that facially created a denominational preference (50a). The Court in *Larson* held only that *Lemon* is inapplicable in those circumstances where a law facially discriminates. *See* 456 U.S. at 252. The Court clarified the *Larson* analytic framework in *Hernandez* v. *Commissioner of Internal Revenue*, 490 U.S. 680, 695 (1989): when there is a claim "that a denominational preference exists," the initial question is whether the challenged law facially differentiates among religions as did the ordinance in *Larson*. "If, however, no such facial preference exists, we proceed to apply the customary three-pronged Establishment Clause inquiry derived from *Lemon*." *Id.* (citation omitted). *Hernandez* thus clarifies that the *Lemon* analysis, rather than

the *Larson* compelling-interest analysis, is to be applied in a case like this, where a facially-neutral statute is claimed to have been enacted out of religious animus.

Hernandez also repudiates the City's suggestion that the Eleventh Circuit should have determined, under *Employment Division* v. *Smith*, 494 U.S. 872 (1990), that the ordinance was constitutional because, the City claims, it is generally and neutrally applicable. Pet. at 15, 28. *Hernandez* makes it quite clear that even if the ordinance were found to be facially neutral and generally applicable, which is not the case here, it would not *ipso facto* survive an Establishment Clause challenge. To the contrary, after legislation claimed to violate the Establishment Clause is determined to be facially neutral, a court should then turn to the *Lemon* analysis, *see* 490 U.S. at 695, as did the Eleventh Circuit in this case.

Finally, the City's claim that the court of appeals should have applied the compelling state interest test in determining whether the ordinance creates an impermissible entanglement between City officials and church entities rather than the *Lemon* analysis is, in essence, a false issue. As the City itself acknowledges, *see* Pet. at 28, this Court has found that the *Lemon* tests "reflect the same concerns that warrant[] the application of strict scrutiny." *Larson*, 456 U.S. at 252. Indeed, in determining whether a regulation creates an excessive entanglement, a court must take into account and incorporate the secular interest of the government into its analysis. The *excessive* entanglement prong of the *Lemon* test, as set forth by this Court, "requires examination of 'the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority.' " *Swaggart*, 493 U.S. at 393 (quoting *Lemon*, 403 U.S. at 613). Consideration of the government's interest is thus built into the process of determining whether a regulation creates an *excessive* entanglement under all the facts and circumstances. The Court's decisions with respect to questions of excessive entanglement reflect precisely this type of analysis. *Cf. Swaggart*, 493 U.S. at 697-699 (balancing government's interest in imposing sales and use tax against level of government intrusion into religious affairs in

finding no excessive entanglement); and *Aguilar* v. *Felton*, 473 U.S. 402 (1985) (weighing nature of state aid, institution receiving aid, and resulting relationship between church and state in administration of aid in finding that entanglement between church and state was excessive).

In sum, the Eleventh Circuit applied the correct legal standards to the Church's Establishment Clause claim, and its analysis presents no compelling question for this Court's review.

B. The Court of Appeals' Free Exercise Analysis Is Consistent With This Court's Decision In *Employment Division v. Smith*

The City contends that the free exercise portion of the court of appeals' decision conflicts with this Court's decision in *Employment Division* v. *Smith*, 494 U.S. 872 (1990), because the court of appeals refused to apply *Smith's* neutrally-and-generally-applicable test to the City's regulation of solicitation activity. The City also incredibly asserts that the Eleventh Circuit "rul[ed] the compelling interest/strict scrutiny test inapplicable" to the Church's Free Exercise claim. Pet. at 17. However, neither of these arguments presents a *bona fide* question meriting this Court's review.

Initially, the City's contention that the court "rul[ed] the compelling interest/strict scrutiny test inapplicable" to the Church's Free Exercise claim is simply not true. The court of appeals clearly applied the test, indeed, stating "we employ 'exacting First Amendment scrutiny' " (55a) (citation omitted). The court concluded that the ordinance did not survive strict scrutiny, not that the test was inapplicable (55a-63a).

Second, the core of the Eleventh Circuit's decision rests upon the Establishment Clause. Thus, even if *Smith* required a less exacting scrutiny under the Free Exercise Clause than applied by the court, the court's purported error would not have affected the outcome of the case.

Third, the court of appeals was clearly correct in applying strict scrutiny to the Church's hybrid free exercise/free speech claim. It is critical to recognize, as the court of appeals did and as the City fails to do, that the First Amendment right at issue is not simply that of free exercise, but a right grounded in freedom of speech and association, as well as the non-entanglement

principles of the Establishment Clause. It is firmly established that solicitation is protected as speech under the First Amendment, both because it is an effective method of proselytizing and because fundraising is necessary for a church or association to survive. *See, e.g.*, *Riley* v. *National Fed'n of the Blind*, 487 U.S. 781, 788-89 (1988); *Village of Schaumburg* v. *Citizens for a Better Env't*, 444 U.S. 620, 629 (1980); *Murdock* v. *Pennsylvania*, 319 U.S. 105 (1943); *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940). Courts carefully scrutinize regulation of solicitations to ensure that the state does not infringe upon protected activity. *See, e.g.*, *Riley*, 487 U.S. at 789 (regulation of charitable solicitation subject to "exacting First Amendment scrutiny"); *Secretary of State of Maryland* v. *Joseph H. Munson Co.*, 467 U.S. 947, 961 (1984) (laws regulating solicitations must be "narrowly drawn" so as not to "unnecessarily interfer[e] with First Amendment freedoms"); *Village of Schaumburg*, 444 U.S. at 637 (same).

The City's reliance upon *Smith* is thus misplaced. *Smith* addressed, and was limited to, "a free exercise claim unconnected with any communicative activity or parental right." 494 U.S. at 882. Indeed, *Smith* carefully noted that its rule did not apply to hybrid situations, such as here, where free exercise concerns are reinforced by other constitutional protections:

> such as freedom of speech . . . *see Cantwell* v. *Connecticut*, 310 U.S. at 304-307 (invalidating a licensing system for religious and charitable solicitations . . .) . . . And it is easy to envision a case in which a challenge on freedom of association grounds would likewise be reinforced by Free Exercise Clause concerns. *Cf. Roberts* v. *United States Jaycees*, 468 U.S. 609 (1984).

494 U.S. at 881-82. Thus, not only does *Smith* not purport to diminish the level of scrutiny required by *Riley, Schaumburg,* and a host of other decisions, but the decision explicitly supports strict scrutiny, as in *Cantwell*, "for religious and charitable solicitations." *Id.* Indeed, to find otherwise, would mean that simply because a church challenged the Clearwater ordinance, the ordinance would be subject to a lesser level of scrutiny than if the challenge had been brought by a secular

charity, e.g., the National Federation for the Blind, as in *Riley*, or by a political advocacy group, e.g., the Citizens for a Better Environment, as in *Schaumburg*.

Finally, in any event, *Smith* should no longer be applied. On November 16, 1993, the President signed into law the Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified at 42 U.S.C. § 2000bb). That Act directs the federal and state courts to apply strict scrutiny to all free exercise challenges to federal, state, and local laws. It prohibits any government entity from burdening religious free exercise, "even if the burden results from a rule of general applicability," *id.* at § 3(a), except "in furtherance of a compelling governmental interest" and then only by "the least restrictive means of furthering that compelling governmental interest." *Id.* at § 3(b). Moreover, the Act applies to all federal, state and municipal laws "whether adopted before or after the enactment of this Act." *Id.* at § 6. And, finally, the government bears the burden of proof to justify any burden on religious free exercise. *Id.* at §§ 3(b) & 5(3).

In sum, the Eleventh Circuit correctly applied the strict scrutiny test to the Church's hybrid free exercise/free speech claim and there is no compelling question of law requiring this Court's review.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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JOHNSON & JOHNSON

Attorneys for Respondent

APPENDIX

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

CASE NUMBER 84-719-CIV-T-17

Filed February 4, 1991

CHURCH OF SCIENTOLOGY FLAG SERVICES ORG., INC.,

Plaintiff,

—v.—

CITY OF CLEARWATER, *et al.*,

Defendants.

JUDGMENT IN A CIVIL CASE

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came before the Court. A decision has been rendered.

IT IS ORDERED AND ADJUDGED

That Plaintiff Church of Scientology Flag Service, Org., Inc.'s Motion for Partial Summary Judgment against Defendants, City of Clearwater, et al., on the issue of standing is Granted.

That Plaintiff Church of Scientology Flag Service Org., Inc.'s Motion for Partial Summary Judgment against Defendants, City of Clearwater, et al., on all issues other than standing is Denied.

That Defendants, City of Clearwater, et al.'s Motion for Partial Summary Judgment against Plaintiff Church of Scientology Flag Service Org. Inc., on the issue of standing is Denied.

That Defendants, City of Clearwater, et al.'s Motion for Partial Summary Judgment against Plaintiff Church of Scientology Flag Service Org. Inc., on all issues other than standing is Granted.

February 4, 1991
Date

DAVID L. EDWARDS
Clerk

MEARLE S. SAYLOR
(By) Deputy Clerk

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CASE NO. 84-719-CIV-T-17

Filed September 16, 1991

CHURCH OF SCIENTOLOGY FLAG SERVICE ORG., INC.,

Plaintiff,

—v.—

CITY OF CLEARWATER, *et al.*,

Defendants.

ORDER

This cause is before the Court on the following:

Dkt. 147 Plaintiff's motion for new trial and/or motion to alter or amend judgment filed, February 19, 1991

Dkt. 153 Defendants' response to Plaintiff's motion for new trial and/or motion to alter or amend judgment, filed March 12, 1991

Dkt. 162 Defendants' motion for leave to file supplemental memorandum in response to the Plaintiff's motion for new trial and/or motion to alter or amend judgment, filed May 3, 1991

Dkt. 163 Plaintiff's motion for leave to respond to Defendants' proposed supplemental memorandum, filed May 16, 1991

The Court has carefully reviewed the above documents. Accordingly, it is

ORDERED:

1. That Plaintiff's motion for new trial and/or motion to alter or amend judgment is denied except to the extent that the judgment should be amended for clarification. The Clerk is directed to amend the judgment to read as follows:

"That Defendants, City of Clearwater, et al.'s motion for summary judgment is denied on the issue of standing, and granted against Plaintiff, Church of Scientology Flag Service Org., Inc., on all other issues."

2. That all other motions listed above are denied as moot (Dkt. 162, 163).

DONE AND ORDERED at Tampa, Florida this 16th day of September, 1991.

/S/ ELIZABETH A. KOVACHEVICH
Elizabeth A. Kovachevich
United States District Judge

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

CASE NO. 84-719-CIV-T-17

Filed September 17, 1991

CHURCH OF SCIENTOLOGY FLAG SERVICE ORG., INC.

—v.—

CITY OF CLEARWATER, *et al.*

AMENDED JUDGMENT IN A CIVIL CASE

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

That Defendants, City of Clearwater, et al.'s motion for summary judgment is denied on the issue of standing, and granted against Plaintiff, Church of Scientology Flag Service Org., Inc., on all other issues.

September 17, 1991
Date

DAVID L. EDWARDS
Clerk

SIMONE A. KONNER
(By) Deputy Clerk

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CHURCH OF SCIENTOLOGY
FLAG SERVICE ORG., INC.,

Plaintiff(s),

vs.

CITY OF CLEARWATER,
et al.,

Defendant(s).
_____/

Case No.
84-96-CIV-T-17

ORDER

In their complaint, inter alia, the plaintiffs contend that amended ordinance 3479-84, a copy of which is attached, facially violates the freedom of religion, freedom of press, freedom of speech, and freedom of association guarantees of the First Amendment; the right of privacy guarantee of the First,

Fourth, Fifth, and Ninth Amendments; and the equal protection and due process clauses of the Fourteenth Amendment to the Constitution of the United States. To facilitate and accelerate the disposition of these claims, the Court requested the parties to submit legal memoranda solely on the issue of the constitutionality of the amended ordinance on its face. Having considered the memoranda, the arguments of the parties, and International Society for Krishna Consciousness of Houston, Inc. v. City of Houston, Texas, 689 F.2d 541 (5th Cir. 1982) and Poe v. City of Humble, Texas, 554 F. Supp. 233 (S.D. Texas 1983), the Court now rules that each and every section of amended ordinance 3479-84 is constitutional on its face.

Pursuant to Title 28 U.S.C. §1292(b), the Court expressly opines that this order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of this litigation. Counsel have indicated to the Court their desire to immediately appeal this Court's ruling; therefore, the Court orders the Clerk of the Court to Administratively Close case numbers 84-96, 84-699, and 84-719 during the pendency of said appeal.

DONE and ORDERED in Chambers, in Tampa, Florida, this 23rd day of July, 1984.

Elizabeth A. Kovachevich
United States District Judge

Copies furnished to:
All Counsel of Record

No. 93-1604

(3)

Supreme Court
JUL 11 1994
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

CITY OF CLEARWATER, FLORIDA, *et al.*,
Petitioners,
v.
CHURCH OF SCIENTOLOGY FLAG SERVICE ORG., INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

~~MOTION FOR LEAVE TO FILE~~ BRIEF AMICUS CURIAE AND BRIEF OF THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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July 11, 1994

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IN THE

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OCTOBER TERM, 1994

No. 93-1604

CITY OF CLEARWATER, FLORIDA, *et al.*,
Petitioners,

v.

CHURCH OF SCIENTOLOGY FLAG SERVICE ORG., INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

~~MOTION FOR LEAVE TO FILE~~ BRIEF AMICUS CURIAE

Pursuant to Rule 37.2 of the Rules of this Court, the amicus respectfully moves this Court for leave to file the attached Brief Amicus Curiae in support of the Petitioners. All Petitioners and Respondent have consented to the filing of this brief. The written consent of the parties has been hand delivered to the Clerk of this Court.

The amicus is an organization called the National Institute of Municipal Law Officers ("NIMLO") and is a non-profit, non-partisan organization, consisting of over fourteen hundred (1400) local governments and municipal attorneys. These member local governments operate NIMLO through their chief legal officers, variously called city or county attorneys, corporation counsel, city solicitors, law directors, and other titles.

It is not now, and never has been, NIMLO's policy to volunteer its services as an amicus to the various municipalities which may have a case before the Court. Rather, NIMLO's amicus participation occurs when a municipality requests NIMLO to evaluate a case for possible nationwide impact and to consider whether amicus support is warranted. Upon receiving such a request, the case in question is reviewed by NIMLO's Board of Directors and, after such review, this Brief is submitted on behalf of NIMLO. NIMLO, which is dedicated to gathering and disseminating information on the most recent legal developments affecting municipalities, has a vital interest in the outcome of this case because many NIMLO members regulate solicitations by charitable organizations. NIMLO believes that the ordinance challenged in this case is valid and proper and that its constitutionality should be affirmed.

This case is compelling because many hundreds, if not thousands, of municipalities, counties and states throughout the country have confronted the ever-increasing problems of fraudulent solicitations of funds by charitable organizations by adopting registration and disclosure laws. There are at least twenty (20) state registration and disclosure laws and hundreds, if not thousands, of municipal and county disclosure ordinances. These statutes and ordinances have been held to be constitutionally permissible means of addressing the problem of fraudulent solicitation by charitable groups. *See, e.g., Village of Schaumberg v. Citizens for a Better Environment, et al.*, 444 U.S. 620 (1980).

Thus, the impact of this case goes far beyond the City of Clearwater. If this Court upholds the Eleventh Circuit's decision, hundreds if not thousands of laws similar to Clearwater's will be jeopardized. The disclosure provisions of Clearwater's law that were held unconstitutional mirror those contained in the other numerous state, county, and city registration and disclosure laws. Yet, the

Eleventh Circuit's ruling comes at a time when the problem of charitable solicitation fraud is growing. Thus, NIMLO and its member local governments are concerned that local governments will be unable to adequately protect their citizens from fraudulent solicitation.

NIMLO and its members have another extremely important interest in this matter. The Eleventh Circuit ruled that Clearwater's law was enacted with an impermissible motive because the need for the law was made clear by the conduct of a group claiming to be a religion. This ruling, if left standing, obstructs NIMLO's members from enacting laws to protect citizens if misconduct by groups claiming to be religious organizations come to the government's attention. Frequently the need for a law is brought to the attention of government by the conduct of one group. If that group happens to be religious, the law will be struck down as having an impermissible motive under the Eleventh Circuit's decision. If the Court's position is not reviewed and reversed, NIMLO's members will be prevented from protecting their citizens from improper conduct that is brought to the government's attention by the actions of a religious group. Additionally, a decision in favor of the Church of Scientology could render unconstitutional other laws already adopted by local governments. All of this contradicts this Court's prior ruling that mere adverse impact on a religion does not prove impermissible anti-religious motive. *See, generally, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, —— U.S. ——, 113 S.Ct. 2217 (1993).

Because the amicus' members regulate solicitation by charitable and religious organizations and have a compelling interest in statutes and ordinances regulating such fundraising, and because amicus wishes to ensure that the Court is made fully aware of the gravity of this case, NIMLO seeks leave to file this brief to assist the Court in the resolution of this case.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 93-1604

CITY OF CLEARWATER, FLORIDA, *et al.*,
Petitioners,

v.

CHURCH OF SCIENTOLOGY FLAG SERVICE ORG., INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF OF THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE

The interest of the amicus is set forth in the motion accompanying this brief.

STATEMENT OF THE CASE

Amicus curiae adopts the statements of the case presented by the Petitioner, City of Clearwater.

SUMMARY OF ARGUMENT

This case is compelling because many hundreds, if not thousands, of local governments throughout the country have confronted the mounting problem of fraudulent so-

licitation of funds by charitable organizations by enacting laws requiring registration and disclosure of charitable organizations. There are at least twenty state disclosure statutes and hundreds if not thousands more municipal and county disclosure ordinances. This Court has for a number of years held that these laws are a constitutionally permissible means of addressing the problem of fraudulent solicitation by charitable organizations. *See, Village of Schaumberg v. Citizens For A Better Environment, et al.*, 444 U.S. 620 (1980).

Thus, the impact of this case reaches far beyond the City of Clearwater. If this Court upholds the Eleventh Circuit's decision, scores of laws similar to Clearwater's will be jeopardized. This is so because the disclosure provisions of Clearwater's law, which the Eleventh Circuit held unconstitutional, are virtually identical to those contained in the numerous state, county, and city disclosure laws.

In upholding disclosure laws as a permissible means of regulating charitable solicitations, this Court has recognized that the disclosure of finances assists in preventing fraud by informing the public of the ways in which its contributions are used. This Court has reiterated on a number of occasions that such laws may be used as companions to anti-fraud criminal statutes. Yet, the Eleventh Circuit held that local governments may be limited to enforcing a criminal anti-fraud statute.

Despite the fact that Clearwater's disclosure requirements mirror those of statutes cited with approval by this Court, *e.g., Riley v. National Federation of the Blind*, 487 U.S. 781 (1988), *Village of Schaumberg*, and the Fifth Circuit, *International Society for Krishna Consciousness v. City of Houston*, 689 F.2d 541 (5th Cir. 1982), the Eleventh Circuit found most of the disclosure provisions of the Clearwater law unconstitutional. In so ruling, the Eleventh Circuit has destroyed registration and disclosure laws of hundreds or thousands of state and

local governments which have been adopted to combat fraud.

The potential disastrous results of the Eleventh Circuit's rulings are exacerbated because the problem of fraudulent solicitation by secular and religious groups has been growing in the past twenty to thirty years. Judge Wisdom recognized in the *Houston* opinion the increase in public awareness of abuses and charitable fundraising. Likewise, charitable organizations themselves have noted that fraudulent activities by unscrupulous charity groups has grown in the past twenty to thirty years. This problem has been further exacerbated because the number of charities has increased tremendously in the past decade. The increase in charities, along with advances in technology, have multiplied the opportunities for charitable solicitation and fraud. As the problem of fraudulent solicitation grows in this country, the need for the enforcement of disclosure laws, which has long been recognized by this Court, continues and increases.

The Eleventh Circuit's decision will also thwart governments from addressing problems outside of the area of fraudulent charitable solicitations. In addressing the issue of whether Clearwater's law was adopted with an impermissible motive, the Eleventh Circuit, unable to point to any evidence of anti-religious animosity against Scientology, relied on newspaper clippings and excerpts from television programs showing deep concern over criminal and other anti-social conduct by Scientology and ruled that this constitutes opposition to Scientology as a religion. By equating Clearwater's concern with the alleged criminal and anti-social conduct of Scientology with anti-religious motive, the Eleventh Circuit has crippled local government from enacting laws addressing problems brought to the forefront by groups claiming to be religious.

Frequently, laws are adopted because the actions of one group bring an issue to the attention of government. If that group happens to be religious, or claims to be re-

ligious, the law will be found to have an impermissible motive and will have to be struck down, according to the Eleventh Circuit's ruling. If the Circuit's position on the issue of impermissible motive is not reviewed and reversed, legislative bodies throughout the country will be precluded from protecting their citizens from improper conduct solely because the legislators learned of the problem through the actions of a religious group.

The Eleventh Circuit's ruling is contrary to this Court's holdings on the issue of impermissible motive. Recently, when this Court found a law to be improperly motivated, it cited evidence of a purpose to regulate conduct motivated by religious beliefs and to confine regulation to adherents of that religion while permitting others to engage in the same conduct. *See, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* —— U.S. ——, 113 S.Ct. 2217 (1993). The record in this case does not contain any evidence similar to that cited by this Court in *Church of the Lukumi Babalu Aye, Inc.* Indeed, the Eleventh Circuit could not point to any evidence that Clearwater's legislators were motivated by animosity towards the religious beliefs of the Scientologists and it ignored the fact that Clearwater's law is neutrally applicable to all eleemosynary secular and religious groups.

For the reasons stated, this Court should review the Eleventh Circuit's decision. Otherwise local governments will be thwarted from addressing the ever increasing problem of fraudulent charitable solicitation and from addressing other problems brought to the forefront by the actions of religious groups.

ARGUMENT

I. THE ELEVENTH CIRCUIT'S RULING EFFECTIVELY WOULD RENDER UNCONSTITUTIONAL HUNDREDS, IF NOT THOUSANDS, OF COUNTY AND MUNICIPAL ORDINANCES AND STATE STATUTES REGULATING THE SOLICITATION OF FUNDS BY CHARITABLE ORGANIZATIONS.

A. Numerous municipalities, counties, and states throughout the country have had to confront problems of fraudulent solicitation of funds by charitable organizations; these governments have done so by adopting registration and disclosure laws. These laws typically require charitable organizations to register in advance with the applicable governmental entity before commencing solicitation, and, at the close of the year, to disclose financial information regarding the collection and use of the funds solicited. Clearwater has cited 20 state registration and disclosure laws in its Petition for Writ of Certiorari, and, in the district court, submitted both municipal disclosure ordinances from Dallas, Texas, Los Angeles, California, Jacksonville, Florida, Alexandria, Virginia, and a list of 236 counties and cities in California alone that have laws requiring permits to solicit charitable contributions. Amicus also notes that approximately 35 cities in Los Angeles County, California alone and eleven suburbs of Cook County, Illinois (the Chicago metropolitan area) have adopted ordinances regulating charitable fundraising.

Such statutes and ordinances have been approved by the courts. See e.g., *Famine Relief Fund v. State of West Virginia,* 905 F.2d 747 (4th Cir. 1990); *Gospel Army v. Los Angeles,* 163 P.2d 704, 708 n.1 (1945), *appeal dismissed,* 331 U.S. 543 (1947). This Court itself has advised local governments on a number of occasions that registration and disclosure laws are a constitutionally permissible means of addressing the problem of fraudulent solicitation by charitable groups. *See, Riley v. National Federation of the Blind; Secretary of the State of Mary-*

land v. Munson, 467 U.S. 947 (1984); *Larson v. Valente*, 456 U.S. 228 (1982); *Village of Schaumberg*. The Court stated in *Village of Schaumberg* that

> Efforts to promote disclosure of finances of charitable organizations also may assist in preventing fraud by informing the public of the ways in which their contributions will be employed. Such measures may help make contribution decisions to be more informed, while leaving to individual choice the decision whether to contribute to organizations that spend large amounts on salaries and administrative expenses.

444 U.S. at 637-38. In *Riley*, this Court reiterated that government "may constitutionally require fund raisers to disclose certain financial information to" government. 487 U.S. at 795.

This Court also has ruled that such laws can be enforced in *addition* to penal anti-fraud statutes. *Id.*[1]

Following the guidance of this Court, numerous local and state governments have adopted registration and disclosure laws to combat fraudulent charitable solicitation.[2] Yet, the Eleventh Circuit struck down Clearwater's law because a city's substantial interest in preventing fraud

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[1] Charitable organizations have expressed support for disclosure laws. For example, the National Health Council, a charitable organization that has approximately 65 charitable groups as its members (most of which are well-known organizations), has stated that disclosure and reporting requirements are the best means of regulating charitable solicitations. The National Health Council, *Viewpoints: State Legislation Regulating Solicitation of Funds from the Public*, (1976 Revised Edition).

[2] For example, the State of California adopted a new disclosure law after this Court issued the decision in *Riley v. National Federation of the Blind*, 487 U.S. 781 (1988). It did so because donors want to know how their charitable donations are spent. While citizens tend to believe that their gifts will be used to carry out charitable programs, a large portion may be consumed in fundraising expenses and every year some portion is siphoned away

allegedly is not furthered by the disclosures required by Clearwater's ordinance (and by hundreds or thousands of other disclosure laws). *Church of Scientology Flag Service Org., Inc. v. City of Clearwater,* 2 F.3d 1514, 1545 (11th Cir. 1993).

The Circuit ruled that disclosures such as those required by Clearwater cannot lawfully be required under the free speech clause. This ruling destroys registration and disclosure laws whether they apply to secular groups alone or to religious groups as well. The Circuit also ruled that, under the Establishment Clause, a disclosure law is unlawful as applied to religious (or purportedly religious) groups even if it is neutrally and generally applicable to secular groups as well and is also supported by a compelling state interest. The Circuit further ruled that, at least as applied to religious (or purportedly religious) groups, a disclosure law cannot lawfully require disclosure of fraudulently omitted information, as opposed to barring affirmatively untruthful statements. Thus, under the Circuit's decision, a disclosure law could not require revelation of the commonly true but commonly undisclosed fact that more than half of the donations made to a group end up in the pockets of professional fundraisers rather than being used for the purposes for which donors believe they are contributing.

Finally, under the Circuit's decision, if the need for a registration and disclosure law was brought to light by the actions of a religious (or purportedly religious) group, the law will *ipso facto* be illegal in its entirety, regardless of whether it is applied to religious groups or secular

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from charities by solicitors who mislead and defraud the public. California's Attorney General also has noted that it is extremely difficult for the average donor to uncover fraudulent or misleading solicitations. On the other hand, misinformed donors are less vulnerable to unsupported charity claims. *Attorney General's Report on Charitable Solicitation by Commercial Fundraisers,* Daniel E. Lungren, Attorney General of the State of California, December, 1993.

ones, as allegedly being the product of anti-religious animus.

B. The Eleventh Circuit's rulings destroy the registration and disclosure laws of hundreds or thousands of state and local governments which have adopted these laws to combat fraud by charitable groups—usually secular groups, but sometimes either religious groups or religious groups conducting secular activities such as businesses in order to obtain monies to be used for religious purposes. This destruction of laws arises because the registration and disclosure provisions assailed by the Circuit mirror the provisions of innumerable laws elsewhere, including laws previously commented on approvingly by this Court.

For example, under the North Carolina law which this Court cited with approval in *Riley*, 487 U.S. at 795, 799, a registrant must provide a detailed financial statement including a balance sheet, amounts of funds raised, costs and expenses, disbursement of funds raised, changes in fund balances, and an accountant's opinion as to the fairness of the presentation of financial information; the methods of solicitation, including a narrative description of the promotional plan together with advertising material prepared for public distribution; the time period and geographic area in which the solicitations will be made; the proposed use of the contributions and the total amount of funds proposed to be raised; the name and address of any branches which will share in the charitable contributions; the locale of financial records; the names, addresses and occupations of officers, directors, trustees, persons directly in charge of the fundraising actvities, and custodians of financial records and contributions; whether any such person has been convicted of a felony; any determination of tax-exempt status under the Internal Revenue Code; whether the registrant is authorized by another governmental entity to solicit contributions and whether any officer or professional solicitor has ever been enjoined from soliciting contributions. N.C. Gen. Stat. § 131C-7.

The disclosure provisions of the law approved in *International Society for Krishna Consciousness v. City of Houston*, 689 F.2d 541 (5th Cir. 1982), are likewise virtually identical to those in Clearwater's law, since the latter was in large part copied verbatim or nearly verbatim from the former. The disclosure provisions of the Los Angeles ordinance approved in *Gospel Army*, which applied to commercial activities of religious organizations, are likewise very similar to Clearwater's, and the provisions of Alexandria, Virginia's laws are similar in numerous aspects.

The *Gospel Army* ordinance required disclosure of, among other things, information regarding the purpose, character, method, and estimated expenses of the solicitation (showing salaries and other items of expense); the need for the contribution to be solicited; the proposed use of the solicited funds; the amount that will remain available for charitable purposes after payment of expenses; the amount received from solicitations in the preceding calendar year; the expenses from such solicitations (including individual salaries or other items of compensation); and the amount that remained available for charitable purposes. *Gospel Army*, 163 P.2d at 708.

The Alexandria ordinance requires that a charitable organization provide the name of the organization and its purpose; a statement reflecting the percentage of the organization's solicited funds used to pay fundraising expenses for the preceding year; its principal address and any address within the city; the names of any branches or affiliates; the place and date of its establishment, the form of its organization; any determination of tax-exempt status under the Internal Revenue Code, the names and addresses of its officers, directors, trustees, principal salaried executive staff officer and any person having custody of the organization's financial records; a statement as to whether the organization intends to have others perform the solicitation; a statement indicating where else in Vir-

ginia the organization has been permitted to solicit; whether it, any officer or professional solicitor has ever been enjoined from soliciting contributions; the purpose for which the solicited funds will be used; the names of those who have responsibility for the custody of the funds; and a statement indicating whether the organization, any officer, or any professional solicitor has been convicted of certain crimes. Section 9-10-2, Alexandria City Code.

Other municipal ordinances also require disclosure of the methods of solicitation, all expenses, including salaries, incurred in the solicitation, and a detailed report of the wages, fees, commissions, and expenses paid in connection with the solicitation.

Because the disclosure requirements of Clearwater's ordinance echo the financial disclosure demanded in the North Carolina and Illinois statutes cited with approval by this Court, and demanded as well in hundreds or thoustands of other laws such as those discussed above, the Eleventh Circuit's decision jeopardizes a huge number of city, county, and state registration and disclosure laws and is contrary to this Court's prior decisions. Therefore, the Eleventh Circuit's rulings raise significant constitutional issues important to cities, counties and states throughout the country which strive to protect their citizens from fraudulent solicitation by constitutionally permissible means.

C. The unfortunate results caused by the Circuit's rulings are multiplied because fraudulent solicitation by secular and religious charitable groups has been growing during the last two to three decades. Thus, Judge Wisdom began his opinion in *City of Houston* by expressly alluding to the increase in public awareness of abuses in charitable fundraising. 689 F.2d at 543. The National Health Council, as long ago as 1976, wrote that "In the past several decades the multiplicity and complexity of tax-exempt activities for charitable purposes in the United States, the willingness of the general public to financially support them, *and the failure of many of these organiza-*

tions to provide adequate financial information created an atmosphere favorable to fraudulent activities by unscrupulous groups." Viewpoints: State Legislation Regulating Solicitation of Funds from the Public at xi (emphasis added). The Council noted further that "notwithstanding the existence of state or federal laws, if local governing bodies determine that citizens of their areas are not protected from unreasonable impositions and fraudulent activities they have the obligation to invoke the police power of government through enactment of proper ordinances." *Id.*

The problem has been further exacerbated because the number of charities has increased tremendously in the past decade. The IRS master file of 501(c)(3) organizations rose from 322,826 to 546,100, a 69% increase from 1982 to 1992. *Hard Cases/Bad Law? Regulating the Sector,* 1993 National Leadership Forum, Remarks by Christine T. Milliken, Executive Director and General Counsel, National Association of Attorney Generals, November 15, 1993. Additionally, charitable groups have discovered that new technologies are allowing them revolutionary new ways to solicit charitable contributions. *Id.*[3]

The increase in charities and the advance of technology have multiplied the opportunities for affirmative fraud or omission. For instance, in California in 1992, 216 commercial fundraisers collected $89,000,000.00 for charities, but less than one-third went to the charities, with the rest being used to pay the fundraisers and cover expenses. One hundred thirty-eight charities in California received 15 percent or less of the money collected by commercial fundraisers on their behalf. *Attorney General's Report on Charitable Solicitation by Commercial Fundraisers.* Virtually every national or world-wide tragic

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[3] Charities continue to thrive in this country. As an example, in California alone in 1992, 63,000 registered, tax-exempt charities collected over $32 billion. *Attorney General's Report on Charitable Solicitation, supra* at 3.

event is now followed by charitable solicitation efforts that result in little or no funds being used for their intended purpose. It has been reported that Desert Storm resulted in the creation of new charities to provide support to U.S. troops, but little or none of the money reached the troops and many states had to issue warnings to the public.

Thus, it is not surprising that, in an informal survey performed by the Executive Director of NAAG in late 1993, 24 states reported that the number of complaints about charitable organizations had increased in the last 2 years. Ten of these states reported *substantial* increases in complaints, and no states reported a decrease in complaints. *Hard Cases/Bad Law?*

The problem of unscrupulous solicitations in this country continues and grows, and the need for the enforcement of registration and disclosure laws therefore continues and grows. Because of the increase in the size of the nonprofit sector and the complexity of its transactions, regulation by disclosure laws is now required more than ever. Yet, the Eleventh Circuit has placed the validity of *all* these laws in peril. Amicus urges this Court to grant Clearwater's petition for certiorari and to continue to allow state and local governments the means, through registration and disclosure laws, to protect their citizens from unscrupulous solicitors.

II. THE ELEVENTH CIRCUIT RULED THAT CLEARWATER ENACTED ITS LAW WITH AN IMPERMISSIBLE MOTIVE BECAUSE THE NEED FOR THE LAW WAS MADE CLEAR BY THE CONDUCT OF A GROUP CLAIMING TO BE A RELIGION. THIS RULING DISABLES GOVERNMENTS FROM ENACTING LAWS TO PROTECT CITIZENS WHEN PROBLEMS COME TO THE GOVERNMENTS' ATTENTION BECAUSE OF MISCONDUCT BY GROUPS CLAIMING TO BE RELIGIOUS.

The Eleventh Circuit has disabled state and local governments from combatting fraud (or other crimes) when the need for such regulation has been made evident by the conduct of a group which is or purports to be religious. This crippling of governmental authority to combat crime has occurred because the Circuit has equated (i) opposition to *fraudulent or other criminal conduct* by a religious group with (ii) *anti-religious* opposition to the group. The Court has compounded this error by ruling that the disclosure law must be entirely thrown out, so that it is enforceable against neither secular nor religious groups, if catalyzed by opposition to the criminal or anti-social conduct of a religious (or purportedly religious) group.

We note that, under the Eleventh Circuit's ruling, the Court's seminal holdings in *Davis v. Beason,* 133 U.S. 333 (1890) and *Reynolds v. United States,* 98 U.S. 145 (1878), could never have been issued. Those cases held that government could enact laws against anti-social misconduct (polygamy) brought to light because practiced by a religious body, the Church of the Latter-Day Saints (Mormons). If the fact that polygamy came to light when practiced by a religion were to render a law constitutionally impermissible, as under the Eleventh Circuit's ruling, then the laws against polygamy could have been enforced against neither the Mormons nor any secular group.

In discussing the motivation underlying Clearwater's ordinance, the Eleventh Circuit was unable to point to *any*

evidence of *anti-religious* animus against Scientology. Indeed, all the record evidence was to the contrary; it not only showed a complete absence of *anti-religious* sentiment, but no knowledge of or concern over any religious tenets of Scientology. The Circuit therefore relied on newspaper clippings and excerpts from television showing deep concern over *criminal* and *other anti-social conduct* by Scientology (e.g., concern over fraud and physical abuse), and ruled that *this* constitutes opposition to Scientology *as a religion*. Such an equation is incorrect on its face. This rationale will cripple any law, however neutrally and generally applicable to secular and religious transgressions alike, which arose because of the actions of a group claiming to be religious. It would, as said, have destroyed the laws against polygamy.

Frequently laws are adopted because the actions of one group bring an issue to the attention of government. If that group happens to be religious, the law will have an impermissible motive and will have to be struck down, according to the Eleventh Circuit. If the Circuit's position is not reviewed and reversed, legislative bodies will be precluded from protecting their citizens from improper conduct that by happenstance is brought to the legislators' attention by the actions of a religious group. This could vitiate laws that have or may arise to deal with drug problems, with criminal acts against doctors and hospitals offering birth control advice and devices or offering abortions, and with various forms of abuse of children, if these problems come to attention because of actions of members of religious organizations.

When this Court recently found a law to be improperly motivated, it cited evidence of a purpose to regulate conduct only when motivated by religious belief, and to confine regulation to adherents of that religion while permitting others to engage in identical conduct. See e.g., *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, —— U.S. ——, 113 S.Ct. 2217 (1993). In *Lukumi Babalu Aye*, this Court cited legislative history showing that,

because of animosity toward the religious beliefs of Santeria, the animal sacrifice laws adopted by Hialeah were intended to target animal sacrifice by a religion because of its religious motivation, but allowed numerous other persons and groups to engage in similar or identical conduct when *not* motivated by religious belief. 113 S.Ct. at 2231. Thus, this Court concluded that the law's objectives were to suppress religion. *Id.* Here, the Eleventh Circuit did not point to *any* evidence that Clearwater's legislators were motivated by animosity towards the religious beliefs of the Scientologists and ignored the fact that Clearwater's law applied equally to a host of secular and religious groups. The Circuit could only muster evidence showing that Clearwater's intent was to stop criminal and anti-social conduct by any group.

In *Lukumi Babalu Aye,* this Court recognized the distinction between laws permissibly motivated to prevent anti-social conduct by any group and laws impermissibly motivated by opposition to religious beliefs of a particular sect. The Court thus noted that adverse impact on a religion does *not* prove impermissible anti-religious motive. "For example, a social harm may have been a legitimate concern of government for reasons quite apart from discrimination. *McGowan v. Maryland,* 366 U.S. at 442, 81 S.Ct. at 1113-14. See e.g., *Reynolds v. United States,* 98 U.S. 145 (1878), *Davis v. Beason,* 133 U.S. 333 (1890) . . . ." *Lukumi Babalu Aye,* 113 S.Ct. at 2227. Thus, this Court has recognized that a legislative body does not harbor an anti-religious animus merely because it elects to adopt a neutral, generally applicable law that has an impact on a religious group and addresses criminal, anti-social or immoral conduct in which the group allegedly engages.

But the Eleventh Circuit was oblivious to the foregoing distinction. Instead, it equated opposition to crime with opposition to religion. It thus has limited the ability of government to confront conduct causing social harm if that conduct is undertaken by a religious group. It is

nonsensical, however, to say that if Clearwater became aware of the need for a disclosure law because of fraudulent solicitation practices of a secular group such as, for example, the American Heart Association, the law would have been adopted with a permissible motive, but to say that exactly the same neutrally and generally applicable law was unlawfully adopted with impermissible motive because the soliciting group whose conduct made a disclosure law necessary claimed to be a religion. Under the Circuit's ruling a government could not permissibly regulate child abuse, violence at aboriton clinics, drug use, or other practices if they came to light because of the action of religious groups, although it could regulate such conduct if it came to light because of the actions of secular groups. Such is not the teaching of this Court, and the Circuit's ruling will prevent government from addressing legitimate concerns raised by anti-social conduct of any group which is or claims to be a religion. Therefore, amicus urges this Court to grant Clearwater's Petition for Writ of Certiorari and to reverse the decision of the Eleventh Circuit.

CONCLUSION

Based on the foregoing, amicus request that this Court grant the Petition for Writ of Certiorari.

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Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONERS

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1. In its opposition, Scientology claims it solicits only from its own members, and repeatedly casts the case as one involving solicitation of a church's own members, on its own premises, for general church purposes. Opp. pp. 2, 4, 14, 17, 23. In effect Scientology likens the matter, as it has throughout the litigation, to the proverbial passing of the hat in church. Relatedly, Scientology claims the case lacks importance because other statutes, its says, do not cover solicitation from a church's own members on its own premises.

Scientology, however, does not confine itself to seeking monies from its own members on its own premises. Rather, it extensively seeks money from the *public*. It does so by concededly selling books and tracts to the public, by extensive advertising typified by an expenditure of six million dollars for advertising in USA Today

alone and by extensive other print and electronic ads, and by trying to persuade persons not previously affiliated with Scientology to sign up for its expensive, claimed religious training, called "auditing," which consists of answering questions while hooked up to a form of lie detector.[1]

Furthermore, the Eleventh Circuit's decision is not limited to solicitation of an organization's own members on its own premises. To the contrary, the decision invalidates registration and disclosure laws dealing with solicitations from the *public*.

2. Scientology claims the case is interlocutory because the issue of impermissible motive was not determined with finality. In fact, the Eleventh Circuit has ruled almost all of the registration and disclosure provisions of the ordinance unconstitutional regardless of legislative motive. Only the legality of a few limited provisions, which the Circuit called "identifying" information, remains dependent on the issue of motive. The Circuit thus said that "with the exception of the *limited* prospective disclosure of identifying information, the *provisions of the 1984 ordinance requiring prospective and retrospective disclosure and record keeping concerning disclosure directed toward members and the public*" are illegal.[2] Petitioner's App. 71a (emphasis added).

3. As throughout this litigation, a significant portion of Scientology's effort to distinguish *International Society*

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[1] Though Scientology claims here that the case involves mere solicitation of members on an organization's own premises, it objected to an exemption for such solicitation and thereby caused it to be removed from the ordinance.

[2] Even with regard to the limited "identifying" information whose legality remains dependent on motive, the Circuit said that newspaper articles and television clips are "unrebutted" evidence of anti religious motive despite sworn denials of such animus in the deposition testimony of Clearwater officials. Thus the issue of motive very likely has been determined since, quite naturally, Clearwater's only evidence is the testimony of its officials.

for Krishna Consciousness v. City of Houston, 689 F.2d 541 (5th Cir. 1982), consists of claims that the Houston ordinance was constitutional because it lacked teeth. Government will lack governing power, and protection of the public will become a curiosity of history, if constitutionality exists only when paired with ineffectiveness.

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